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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CHARLES KIRK DIGGS,

Petitioner,

v.

DAVID DIGUGLIELMO, WARDEN: THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although a criminal defendant has the right to proceed *pro se* during a criminal trial and during the various post-trial proceedings, a conflict has emerged between the various circuits and, indeed, between the highest courts of the states, concerning the nature of examination the trial judge must conduct before permitting a defendant to proceed without counsel. The following issues are raised by this case:

1. Does the Sixth Amendment require that a trial court conduct a penetrating and comprehensive examination of the defendant's request to proceed *pro se* before permitting him to do so?

2. Did the trial court's instruction to the jury constitute a mandatory presumption that relieved the state of the burden of proving petitioner's guilt beyond a reasonable doubt in violation of the Fifth Amendment?

PARTIES TO THE PROCEEDING

A. Petitioner

Petitioner is Charles Kirk Diggs, an inmate at the Pennsylvania State Correctional Institution at Graterford, Pennsylvania.

B. Respondents

Respondent, David DiGuiglielmo, is the Warden of the Pennsylvania State Correctional Institution at Graterford, Pennsylvania. The District Attorney of the County of Philadelphia is an elected official serving as the prosecutor of crimes committed in the County of Philadelphia, Pennsylvania. The Attorney General of the State of Pennsylvania is an employee of the Commonwealth of Pennsylvania.

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OPINIONS BELOW

Petitioner seeks review from the March 25, 2008 decision of the Third Circuit denying petitioner's application for a certificate of appealability. The Third Circuit issued this denial without opinion. On April 29, 2008, the Third Circuit denied a petition for en banc rehearing.

The opinions below include:

Memorandum opinion of November 14, 2007 of U.S.D.J. John R. Padova. (Appendix E; A.143a)

Report and Recommendation of March 28, 2007 of United States Magistrate Peter B. Scuderi (Appendix D; A. 69a)

Opinion of August 15, 1996 of Pennsylvania Superior Court (Appendix A; A. 1a)

Opinion of April 19, 2005 of Pennsylvania Superior Court (Appendix C; A. 37a)

Opinion of March 25, 2002 of Philadelphia Court of Common Pleas (Appendix B; A. 13a)

Opinion of October 10, 2003 of Pennsylvania Superior Court (Appendix F; A. 205a)

None of these opinions are officially reported.

STATEMENT OF JURISDICTION

The Order denying Rehearing En Banc was entered by the United States Court of Appeals for the Third Circuit on April 29, 2008. Jurisdiction of the Supreme court of the United States is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Constitution of the United States, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(2) Constitution of the United States, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

(3) Constitution of the United States, Amendment XIV

Sec. 1. [Citizens of the United States.]

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(4) 28 U.S.C. § 2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 [28 USCS § 2255] before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person's detention pending

removal proceedings.

(c) (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255 [28 USCS § 2255].

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

Statement of Facts

On February 12, 1974, Linda DeBose was found stabbed in the basement of her home in Philadelphia, Pennsylvania. She was taken to Albert Einstein Medical Center, where she later died. At petitioner's trial, the police officers testified, in response to questioning about the name(s) of the assailant(s), that the victim identified "Louis Riggins," "Brother Alfred," and "Brother Charles"—whom she identified as attending a certain mosque.

Within three hours of the murder, the police arrested Louis Riggins, who had petitioner's identification in his possession. The police arrested petitioner in June 1974.

Trials in Philadelphia Court of Common Pleas

Petitioner was initially tried three times in the Philadelphia Court of Common Pleas. The crucial issue in these trials was whether the "Brother Charles" identified in the dying declaration was, in fact, petitioner, Charles Diggs. In November 1977, a jury found petitioner guilty of first-degree murder and other charges. Petitioner pursued his appellate rights for several years. In 1991, the United States District Court for the Eastern District of Pennsylvania granted petitioner federal habeas corpus relief on the ground that the prosecution had systematic-

cally excluded persons of African descent from the jury on the ground of race. The District Court granted a new trial.

In October 1991, petitioner was retried in the Philadelphia Court of Common Pleas. On October 25, 1991, the jury again convicted petitioner of first-degree murder and other charges.

Post trial Motions

On February 28, 1994, petitioner argued post-verdict motions pro se before the trial judge, who attempted to appoint as "backup counsel" an attorney whose judgment and skill petitioner disputed. The trial judge denied the post trial motions and sentenced petitioner on September 7, 1994.

Direct Appeal

Petitioner filed a direct appeal to the Pennsylvania Superior Court, which affirmed the conviction on August 15, 1996. Appendix A. On July 14, 1997, the Supreme Court of Pennsylvania denied a petition for allowance of appeal. On February 23, 1998, this Court denied a petition for certiorari.

Petition for Post Conviction Relief

In January 1999, petitioner filed a petition for post-conviction relief under the applicable state statute. On January 8, 2002, the Philadelphia Court of Common Pleas denied the application for post conviction relief. Petitioner appealed this determi-

nation to the Pennsylvania Superior Court which, on October 10, 2003, affirmed the denial of post conviction relief, finding that all but one of the issues was waived. Appendix F. On September 16, 2004, the Pennsylvania Supreme Court remanded the matter to the Superior Court and instructed that it consider all of the issues complained of by petitioner. On April 15, 2005, the Pennsylvania Superior Court affirmed the denial of post conviction relief. Appendix C. On December 13, 2005, the Pennsylvania Supreme Court denied a petition for allowance of appeal.

Habeas Proceedings

On January 4, 2006, petitioner filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Eastern District of Pennsylvania. On March 28, 2007, Magistrate Judge Peter Scuderi filed a Report and Recommendation recommending that the Petition be denied. Appendix D. Petitioner filed objections to the Report and Recommendation. On November 14, 2007, the Honorable John R. Padova issued an opinion denying the Petition for a Writ of Habeas Corpus. Appendix E.

Petitioner filed an Appeal to the United States Court of Appeals for the Third Circuit. On March 25, 2008 the Third Circuit denied petitioner's application for a certificate of appealability. On April 29, 2008, the Court denied a petition for en banc rehearing.

REASONS FOR GRANTING WRIT

This Court should grant a writ of certiorari because a split has emerged among the circuits and, indeed, in the state courts concerning the level of inquiry required of a trial judge before a criminal defendant may be permitted to represent himself pro se. Although this Court has held that a criminal defendant has the right to conduct his own defense, it only briefly discussed the procedure for waiving counsel. As a result, a patchwork of opinions has arisen with conflicting and inconsistent assessments of what questions should be asked and what answers elicited before permission is given. The time has come for this Court to resolve many of the issues that have arisen and to enunciate a standard.

In *Faretta v. California*, 422 U.S. 806, 807 (1975), this Court held that a State may not "hale a person into its criminal courts and there force a lawyer upon him, even when he insists that he wants to conduct his own defense." The right of self-representation, *Faretta* concluded, flows from the structure, logic, and history of the Sixth Amendment, which "does not provide merely that a defense shall be made for the accused; [but] . . . grants to the accused personally the right to make his defense," 422 U.S. at 819 (emphasis added). Because the right is personal--and because "[t]he defendant, and not his lawyer or the State, will bear the personal consequences of a conviction"--"[i]t is the defendant . . .

who must be free personally to decide whether in his particular case counsel is to his advantage." Id. at 834 (emphasis added). And when the State "thrust[s] counsel upon the accused, against his considered wish, . . . the right to make a defense is stripped of the personal character upon which the [Sixth] Amendment insists." Id. at 820.

As this Court recognized, those "who wrote the Bill of Rights" understood not only "the inestimable worth of free choice" generally, but also the particular importance of being able to proceed pro se. 422 U.S. at 833-834. This Court noted that, "[i]n the long history of British criminal jurisprudence, [the only] tribunal that ever adopted a practice of forcing counsel on an unwilling defendant . . . was the Star Chamber." Id. at 821. And in colonial America, where "insistence upon a right to self-representation was, if anything, more fervent than in England," Id. at 826, this Court was unable to locate a single "instance where a colonial court required a defendant in a criminal case to accept as his representative an unwanted lawyer," Id. at 828.

This Court did not flinch from the recognition that a defendant's choice of pro se representation would seldom be a wise one. "It is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts." 422 U.S. at 834.

Nor did this Court underestimate the magnitude of the "detriment." Describing "the help of a lawyer [as] essential to assure the defendant a fair trial," 422 U.S. at 832-833 (emphasis added), this Court observed:

> Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceeding against him. Without it, though he be not guilty, he faces the danger of conviction because he does not *know how to establish his innocence.*

Id. at 833 n.43 (emphasis added) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

Significantly, this Court then specifically observed that, if that risk is present for "men of intelligence, how much more true is it of the ignorant and illiter-

ate, or those of feeble intellect." 422 U.S. at 833 n.43 (emphasis added). Nonetheless, this Court concluded that the defendant's choice to proceed pro se "must be honored, out of 'that respect for the individual which is the lifeblood of the law.'" Id. at 834 (quoting *Illinois v. Allen*, 397 U.S. 337, 350-351 (1970) (Brennan, J., concurring)).

This Court only briefly discussed the procedure for waiving counsel. Justice Stewart, writing for the majority, held that a waiver of counsel must be knowing and intelligent, and that the defendant should "be made aware of the dangers and disadvantages of self-representation, so that . . . he knows what he is doing and his choice is made with eyes open." Id. at 835 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 279 (1942)). The decision's provision of a basic procedure for waiver does give some protection to defendants (as well as to the courts that have to deal with the consequences of inappropriate waiver cases) by stating that waivers of counsel that are not entered into with "eyes open" are unconstitutional. *Faretta*, 422 U.S. at 835.

The decision, however, does not go far enough to put forward a standard for a valid waiver of counsel. Since the *Faretta* decision, the various circuits have taken divergent views on what constitutes a valid waiver. See generally *United States v. Erskine*, 355 F.3d 1161 (9th Cir. 2004); *United States v. McBride*, 362 F.3d 360 (6th Cir. 2004); *Dallio v. Spitzer*, 343 F.3d 553 (2d Cir. 2003); *United States v. Joseph*, 333

F.3d 587 (5th Cir. 2003); *United States v. Cassidy*, 48 Fed. Appx. 428 (4th Cir. 2002); *United States v. Kimball*, 291 F.3d 726 (11th Cir. 2002); *United States v. Oreye*, 263 F.3d 669 (7th Cir. 2001); *Braun v. Ward*, 190 F.3d 1181 (10th Cir. 1999); *United States v. Salemo*, 61 F.3d 214 (3d Cir. 1995); *Berry v. Lockhart*, 873 F.2d 1168 (8th Cir. 1989); *United States v. Bailey*, 675 F.2d 1292 (D.C. Cir. 1982); *Maynard v. Meachum*, 545 F.2d 273 (1st Cir. 1976).

Possibly the most restrictive of these circuits is the Sixth Circuit. In *United States v. McBride*, 362 F.3d 360 (6th Cir. 2004), the court stated that before a defendant is allowed to waive counsel, the trial judge must ask the defendant thirteen questions drawn from the Bench Book for United States District Judges. A "strongly worded admonishment" against self-representation is also included in this procedure. Id. at 366. See also *United States v. McDowell*, 814 F.2d 245, 250 (discussing dialogue and inquiry that must take place between judge and accused before self-representation may take place.) Literal compliance with the standard is not required, as the Sixth Circuit held that asking twelve out of the thirteen questions is sufficient. See *McBride*, 362 F3d at 366. In addition, the Ninth Circuit has held that in order to properly determine the validity of a waiver, the trial judge must "insure that [the defendant] understands 1) the nature of the charges against him; 2) the possible penalties; and 3) the dangers and disadvantages of self-representation," rather than simply

suggest that the judge should do these things. *United States v. Erskine*, 355 F.3d 1161, 1167 (9th Cir. 2004), quoting *United States v. Balough*, 820 F.2d 1485, 1487 (9th Cir. 1987).

While the Ninth Circuit does not require as rigid a formula as the Sixth Circuit, the Eighth Circuit holds similarly, stating that it is essential that the defendant be made aware of the dangers and disadvantages of self-representation. See *Berry v. Lockhart*, 873 F.2d 1168, 1170 (8th Cir. 1989) (ruling that accused must be made aware of all disadvantages of self-representation); *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988) (offering judges' option to warn of dangers and disadvantages of self-representation). However, the Eight Circuit asserts, based on a totality of circumstances test, that if the defendant has this knowledge from elsewhere, the judge is not required to give a detailed warning. See *Meyer v. Sargent*, 854 F.2d 1110, 1114 (8th Cir. 1988) (explaining that warning is not always required or absolute). See generally Brian H. Wright, Comment, The Formal Inquiry Approach: Balancing a Defendant's Right to Proceed Pro se with a Defendant's Right to Assistance of Counsel, 76 Marq. L. Rev. 785, 794 (1993) (discussing Eight Circuit's view along with six other circuits which hold that waiver can be discerned from defendant's knowledge of circumstances).

Advocating a low standard for waiver validity is the Seventh Circuit, which held in *United States v.*

Oreye, 263 F.3d 669 (7th Cir. 2001) that it is the judge's responsibility to ensure that the defendant knows his rights and does not make any "hasty decisions." Id. at 672. Judge Posner stated that, though the court must make sure of this, the judge cannot mandate any kind of warning. Id. at 672. The danger of this, as stated in *United States v. Hill*, 252 F.3d 919 (7th Cir. 2001) is that, if a specific warning were given, the judge would "depict self-representation in such unremittingly scary terms that any reasonable person would refuse." Id. at 928 – 29.

The Fourth Circuit holds that the trial court must determine from the record as a whole whether a defendant's waiver was "knowing and intelligent." *United States v. Cassidy*, 48 Fed. Appx. 428 (4th Cir. 2002). However, it notes that failure to grant a waiver where the defendant deserves one is reversible error. Id. at 438. In reviewing the sufficient of a waiver of the right to counsel, the appellate court must consider the whole record. *United States v. Bush*, 404 F.3d 263 (4th Cir. 2005).

Likewise, the First Circuit espouses the view that a waiver decision should be made on the case's facts (*United States v. Campbell*, 874 F.2d 838, 845 (1st Cir. 1989)) and states that there are no required questions or warnings to determine whether a waiver is valid. *United States v. Manjarrez*, 306 F.3d 1175, 1179 (1st Cir. 2002) (acknowledging First Circuit's more contextual approach to evaluating waiver of counsel); *Campbell*, 874 F.2d at 845 (stating that

First Circuit has not construed earlier cases to require particular technical inquiry); *Meachum*, 545 F.2d at 279 (adopting less technical approach).

Finally, several Circuits walk the fine line between these two views. The Fifth Circuit, in *United States v. Joseph*, 333 F.3d 587 (5th Cir. 2003) states that the defendant should be aware of the dangers and disadvantages of self-representation, but that the trial judge's decision may come from a consideration of the defendant's age, experience, education and background. See: *United States v. Davis*, 269 F.3d 514, 518 (5th Cir. 2001) (court should ensure defendant is fully aware of decision); *United States v. Martin*, 790 F.2d 1215, 1218 (5th Cir. 1986)(holding that defendant must make decision "knowingly and intelligibly" and must be unequivocal). In *United States v. Kimball*, 291 F.3d 726 (11th Cir. 2002), the Eleventh Circuit lists many of the Faretta requirements for a waiver, but prefaces them all with a "should" rather than a "must." Id. at 730. For example, the court states that the judge should make the defendant aware of the dangers and disadvantages of self-representation and that there should be a pretrial inquiry into the matter. See *United States v. Kimball*, 291 F.3d 726, 730 (11th Cir. 2002) (recognizing that defendants have the right to represent themselves).

The District of Columbia Circuit has added to the Eleventh Circuit's determination, stating that the trial judge's decision must be made clear on the re-

cord. See *United States v. Bailey*, 675 F.2d 12932, 1300 (D.C. Cir. 1982)(holding that "dangers and disadvantages of self-representation" must be made clear on the record.); *Hsu v. United States*, 392 A.2d 972, 983 (D.C. Cir. 1977)(requiring clarity on record regarding waiver of counsel).

In *United States v. Jones*, 452 F.3d 223, 232 (3d Cir. 2006), the Third Circuit rejected the other circuits' approach of reviewing record as a whole and instead required "[a] complete, on-the-record colloquy with the defendant" as "a significantly better way of protecting the right to counsel than the whole-record approach".

In *United States v. Willie*, 941 F.2d 1384, 1388-89 (10th Cir. 1991), the Tenth Circuit recognized that the ideal practice is for trial judge to conduct comprehensive inquiry on the record. It held, however, that deficiencies in trial judge's inquiry do not automatically require reversal when the surrounding facts and circumstances demonstrate a valid waiver.

In *Hooks v. State*, 176 P.3d 1081 (Nev. 2008), the Supreme Court of Nevada reversed a criminal conviction on the ground that the defendant did not knowingly, intelligently, and voluntarily waive his right to counsel when he exercised his right to represent himself at trial. The Court noted the split in the federal circuits on the issue of what level of inquiry is required. It found that a state rule required that the court should make a specific, penetrating

and comprehensive inquiry of the defendant to determine whether the defendant understands the consequences of his or her decision to proceed without counsel. The Court further noted that the same rule identifies some of the dangers, disadvantages, and consequences of self-representation that the court should address in its inquiry. Further areas of suggested inquiry include the defendant's understanding of the charges and the possible penalties. The rule required that the court make findings on the record as to whether the defendant waived the right to counsel "freely, voluntarily and knowingly, and has a full appreciation and understanding of the waiver and its consequences." Id. at 1084-1085. The colloquy between the trial judge and the defendant did not meet this standard, so the conviction was reversed.

The instant case is significant because the trial court conducted no colloquy of any sort when your petitioner represented himself at the post-verdict motion hearing on February 28, 1994. At this hearing, the trial court failed to conduct any inquiry to determine whether defendant's decision to dispense with counsel at these critical stages was knowing, voluntary and intelligent. Petitioner asserts that his lack of counsel at the post-trial hearing caused him to lose valuable appellate rights. The post-verdict stage is a critical stage of the criminal proceedings because it is at the infancy of the appellate process. If certain issues are not raised, they are deemed

waived by the appellate courts. The Sixth Amendment requires effective assistance of counsel in post trial proceedings. *Strickland v. Washington*, 466 U.S. 668 (1984) . In the case at bar, the trial court attempted to appoint counsel whom your petitioner believed to be ineffective to present post-verdict motions. Petitioner believed that this counsel had abrogated his responsibilities in other cases. The trial judge failed to make any record on this issue. Petitioner represented himself. At oral argument, the trial court never questioned your petitioner concerning his decision to proceed pro se. This was a violation of all of the standards of all the circuits as set forth above. In the Sixth Circuit, the trial court must ask defendant thirteen questions drawn from the Bench Book for United States District Judges. A "strongly worded admonishment" against self-representation is also included in this procedure. The record in the case at bar contains no questions of any sort, let alone a strongly worded admonishment. Under the Fifth Circuit's approach, defendant should be aware of the dangers and disadvantages of self-representation. In the case at bar, there was no colloquy as to whether your petitioner was made aware of any dangers or disadvantages. In the District of Columbia Circuit, there must be clarity on record regarding waiver of counsel. In the case at bar, no record was made. In Nevada, a specific, penetrating and comprehensive inquiry of the defendant must be made. In the case at bar, no record of any sort was made.

This is significant because under provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1), the writ may issue after a state conviction only if the state court decision being challenged "was [1] contrary to, or [2] involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Fischetti v. Johnson*, 384 F.3d 140, 147 (3d Cir. Pa. 2004). Simple error will not necessarily suffice. This Court has definitively held that that a waiver of counsel must be knowing and intelligent, and that the defendant should "be made aware of the dangers and disadvantages of self-representation, so that . . . he knows what he is doing and his choice is made with eyes open." *Faretta*, supra. at 835. The fact that the trial judge permitted petitioner to proceed pro se without any colloquy of any sort is "diametrically different," "opposite in character or nature," or "mutually opposed" to the "clearly established" decision of this Court that the defendant make his choice to proceed pro se with his eyes wide open. *Williams v. Taylor*, 529 U.S. 362, 405 (2000). Therefore, the error meets the standard required for the issuance of the writ under the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2254(d)(1).

This is important because certain crucial issues—particularly the erroneous jury instructions—were not raised in the post-trial motions and were ultimately deemed waived. Your petitioner contends

that the trial judge erred when she instructed the jury about the "dying declaration" of the murder victim. She gave the following erroneous instruction:

> I charge you now on identity and on dying declarations.
>
> Proof beyond a reasonable doubt of the identity of the defendant as the person who committed the crime is essential to convictions.
>
> You have heard the statement of Linda DeBose as to the identity of her killers. This statement was made after she sated several times that she was dying.
>
> . . .
>
> In the case of the dying declaration, the awareness of impending death provides the assurance of the truthfulness of the utterance. . . .

N.T. 10/24/91, p. 457 (Emphasis added). This instruction was clearly erroneous. Petitioner does not deny that under both state and federal law, a dying declaration is admissible as an exception to the hearsay rule. In order for this "dying declaration" to be admissible, the declarant "must have spoken with the consciousness of a swift and certain doom." *Shepard v. United States*, 290 U.S. 96, 100 (1933). However, the declarant's state of mind and the credibility, interpretation and weight to be given the

dying declaration are for the jury under proper instructions. *Commonwealth v. Cooley*, 465 Pa. 35, 348 A.2d 103 (1975). The instruction given in this case was improper because it created a mandatory presumption that the dying declaration was truthful. A mandatory presumption instructs the jury that it must infer the presumed fact if the state proves certain predicate fact. A permissive inference, on the other hand, suggests to the jury a possible conclusion to be drawn if the state proves certain predicate facts, but it does not require that the jury draw the conclusion. A mandatory presumption "affects . . . not only the strength of the 'no reasonable doubt' burden but also the placement of that burden; it tells the trier that he or she must find the elemental fact upon proof of the basic fact, at least until the defendant has come forward with some evidence to rebut the presumed connection between the two facts." *Ulster County Court v. Allen*, 442 U.S. 140, 157 (1979). If a jury instruction contains a mandatory presumption, a reviewing court must examine the presumption on its face to determine the extent to which the basic and elemental facts truly coincide. If these facts do not coincide, then the presumption will be deemed violative of due process, regardless of whether an independent evaluation of the facts presented by the state supports the mandatory inference. Id. A mandatory presumption violates the Fourteenth Amendment, because it may relieve the State of its burden of proving all elements of the offense. *Sandstrom v. Montana*, 442 U.S. 510, 61 L.

Ed. 2d 39, 99 S. Ct. 2450 (1979); *Francis v. Franklin*, 471 U.S. 307, 85 L. Ed. 2d 344, 105 S. Ct. 1965 (1985); *Sullivan v. Louisiana*, 508 U.S. 275, 280 (U.S. 1993). The instant instruction in fact advised the jury that the deceased identified petitioner and, since the identification was in the form of a dying declaration, the identification must be deemed as truthful. This was in error. The "dying declaration" rule renders such a declaration admissible. It does not render it highly credible, much less binding or obligatory. The denial of the right to a jury verdict of guilt beyond a reasonable doubt, the consequences of which are necessarily unquantifiable and indeterminate, is certainly a "structural defect in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards" under *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

With regard to the crime of conspiracy, petitioner contends that the following passage from the jury instruction was improper:

> Where two or more join in the commission of an unjustified assault with results fatally, all are guilty, regardless of which on e inflicts the mortal wound.
>
> Where two or more combine to make an assault, and in carrying out such common purpose another is killed, the one who enters into the combination but does not personally commit the wrongful act is equally

> responsible for the homicide as the one who directly causes it.
>
> Conspiracy is not synonymous with aiding an abetting. Conspiracy requires an agreement to commit a crime, plus an over act.
>
> Now, conspiracy is not synonymous with aiding and abetting. Conspiracy requires an agreement to commit a crime, pus an overt act.

N.T. 10/24/91, p. 396 0 297, 418. Petitioner contends that this instruction leaves the jury with the wrong understanding because the charge asserts that if one defendant only intended to commit simple assault and another intended to murder and death occurred, then even the defendant who only intended to assault would also be guilty of first degree murder. This is an improper statement of the law.

Furthermore, the trial judge confused the jurors when she instructed them, in relevant part, on the requisite intent required to be guilty of murder in the first degree. The trial judge initially instructed the jury in the following manner:

> I shall now define murder in the first degree. A criminal homicide constitutes murder of the first degree when it is committed by an unintentional killing.

Trial counsel failed to object to this charge. Furthermore, in response to the jury's request for clarification, the trial judge failed to acknowledge the above error and stated the following regarding first-degree murder:

> Now, a definition of murder in the first degree. A criminal homicide constitutes murder in the first degree when it is committed by an intentional killing.
>
> As used in this statute, intentional killing means any willful, deliberate and premeditated killing.
>
> A killing is willful and deliberate if the defendant consciously decided to kill the victim and it is premeditated if the defendant possessed a fully-formed intent to kill at the time he acted, even though there need not have been any appreciable amount of time between the time when the defendant first conceived the idea of killing and the time when he acted.
>
> The design to kill can be formulated in a fraction of a second. In determining whether or not the defendant committed the kind of intentional killing required for first degree murder, you should consider the testimony of the expert witnesses as well as all other evidence, which may shed light on

> what was going on in the defendant's mind at the time of the alleged killing.
>
> If the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may infer from that, that the killing was intentional.

N.T. 10/24/91, p. 414 – 415.

This clarification contradicts that prior instruction given to the jury. However, the trial judge defined murder as an intentional killing with no mention, reference or withdrawal of her prior instruction. The Courts below agreed that although the initial definition of first degree murder was erroneous, the error was cured by the subsequent clarification instruction. Your petitioner disagrees and contends that the trial judge should have specifically withdrawn the prior instruction and provided a cautionary instruction. The erroneous instruction could not be and was not cured by new instruction that materially contradicted an earlier one.

Had your petitioner been given a proper colloquy, then he would not have proceeded pro se, without the benefit of counsel. As the Magistrate Judge noted, your petitioner was found to have waived the erroneous jury charge issue by failing to raise it on direct appeal. Opinion of Magistrate Judge Scuderi, p. 20; A. 91a – 92a. The District Court judge agreed and found that it was procedurally defaulted. Opinion of District Judge Padova, p. 17; A. 151a. There-

fore this important issue was lost forever in the appellate process because the trial judge permitted your petitioner to proceed with post-trial motions without an appropriate colloquy.

We maintain, however, that this Court has made clear that the right to counsel at trial is fundamental and cannot be actually waived except voluntarily and knowingly. As this Court has observed, there is a "strong presumption" against the waiver of the right to counsel. *Patterson v. Illinois*, 487 U.S. 285, 307 (1988). Furthermore, the mandatory language of the jury instruction was a "structural defect in the constitution of the trial mechanism," which is not subject to harmless error or procedural default. *Sullivan v. Louisana*, 508 U.S. 275 (1993). Therefore, the Third Circuit should have granted a certificate of appealability and considered the issues in this case.

This Court should grant a writ of certiorari because it has not spoken about the issue since issuing a decision in *Faretta v. California*, supra. several decades ago. Since that decision was written, contradictory and confusing standards have emerged in the lower courts concerning what level of inquiry a trial judge should employ before permitting a criminal defendant to proceed pro se. Aside from a general admonition that such a defendant should only be permitted to proceed with his "eyes wide open," this Court gave little guidance to the lower courts. This case presents this Court with an opportunity to explore the existing standards and to give guidance

to the lower courts as to what it means to have open eyes and what procedures a trial judge should employ to make that determination.

CONCLUSION

This Court should grant certiorari in this case to resolve the conflict among the circuit courts and state courts concerning the level of inquiry required of a trial judge before a criminal defendant may be permitted to represent himself pro se. Considerable confusion has emerged in the lower courts. This Court should take this case as an opportunity to enunciate an appropriate standard to be employed by the lower courts. Furthermore, this Court should grant certiorari and conclude that the instruction to the jury was constitutionally infirm because it relieved the state of the burden of proving petitioner's guilt beyond a reasonable doubt in violation of the Fifth Amendment.

Respectfully submitted,

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APPENDIX

APPENDIX A – OPINION, FILED AUGUST 15, 1996

Commonwealth of PA	: In the Superior Court of
v.	: Pennsylvania
Charles Diggs,	:
Appellant	: No. 3664 Phila. 1994

Appeal from the ORDER ENTERED September 7, 1994 In the Court of Common Pleas, Criminal Division, Philadelphia County, No. 7407-2079

BEFORE: CAVANAUGH, TAMILIA, HOFFMAN, JJ.

MEMORANDUM: FILED: AUGUST 15, 1996

Charles Diggs appeals from the judgment of sentence of life imprisonment, imposed after he was found guilty of first degree murder, criminal conspiracy, possession of an instrument of crime and prohibited offensive weapons. Underlying the offense in this case was in the 1974 death of the victim, Linda DeBose, who was brutally stabbed 69 times and left to die in her basement, but survived long enough to identify her attackers. In 1977, appellant was convicted of first degree murder in relation to the killing of the victim; and his conviction was

affirmed on appeal.[1] Subsequently, in 1991, federal habeas corpus relief was granted and a new trial was ordered, pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), on the grounds that the prosecution had systematically excluded black venire persons by challenging them solely on the basis of race.[2] Appellant was retried in 1991 and convicted of the above enumerated offenses. Appellant chose to represent himself during post-trial motions.[3] The court denied these motions and sentenced appellant to life imprisonment. Appellant then took this appeal and is now represented by counsel.[4] Finding no merit to

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[1] Appellant was tried twice for the killing of the victim in 1976. Both of these trials ended in mistrials.

[2] Although appellant's conviction occurred in 1977, his direct appeal from the judgment of sentence of life imprisonment was still pending when the United States Supreme Court decided Batson.

[3] Trial counsel was permitted to withdraw. New Counsel was appointed and acted as "advisory" counsel during the post-trial motion stage due to appellant's election to represent himself.

[4] Appellant is represented by counsel on appeal. New counsel has filed a brief on appellant's behalf. Appellant has, in addition, filed a pro se brief. We will not consider a pro se brief where a counseled brief has been filed on appellant's behalf. See Commonwealth v. Ellis, 534 pa. 176, 626 a.2d 1137 (1993).

the issues raised by appellant, we affirm the trial court's judgment of sentence.

Appellant first contents that the trial court erred in denying his motion to dismiss on double jeopardy grounds where the prosecutor was found to have acted improperly at an earlier trial by striking blacks solely on the basis of race. He maintains that striking prospective jurors solely on the basis of race was specifically undertaken to prejudice him and deprive him of a fair trial.

We begin our analysis by noting that the federal district court concluded that the grant of a new trial would not subject appellant to double jeopardy in violation of the United States Constitution. Appellant's double jeopardy claim has been made pursuant to the Pennsylvania Constitution, and in support of this argument he relies principally on *Commonwealth v. Jay Smith,* 532 Pa. 177, 615 A.2d 321 (1992). In *Smith*, our supreme court stated:

> We now hold that the double jeopardy clause of the Pennsylvania Constitution prohibits retrial of a defendant not only when prosecutorial misconduct is intended to provoke the defendant into moving for a mistrial, but also when the conduct of the prosecutor is intentionally undertaken to prejudice the defendant to the point of the denial of a fair trial. Because the prosecutor's conduct in this case is intended to

> prejudice the defendant and thereby deny him a fair trial, appellant must be discharged on the grounds that his double jeopardy rights, as guaranteed by the Pennsylvania Constitution, would be violated by conducting a second trial.

Id. at ___, 615 A.2d at 325.

Here, the record is devoid of evidence that the Commonwealth, in excluding black jurors, undertook to prejudice appellant and deprive him of a fair trial. The federal district court, in granting a new trial observed:

> Respondent's brief in this court suggests that the magistrate's decision unnecessarily and improperly stigmatizes the hard-working and honorable assistant district attorney who tried the case. In my view, no such inference is warranted. A prosecutor who legitimately worries about whether prospective jurors might unduly sympathize with a defendant of their own race, and who takes steps which were then generally regarded as entirely proper to eliminate that concern, is not thereby guilty of racism, merely excessive zeal. The Batson decision in 1986 raised warning flags concerning jury selection which would not have been thought of by prosecutors in 1977.

Additionally, the trial court in denying post-trial motions, classified the conduct of the Commonwealth as prosecutorial error, rather than prosecutorial overreaching. Our independent review of the record confirms these conclusions. There is no evidence that the Commonwealth acted in bad faith or that it specifically undertook to deny appellant a fair trial. Moreover, as noted by the federal court, steps taken out of a legitimate concern that prospective jurors would unduly sympathize with a defendant of their own race were not, at the time of appellant's first conviction, regarded as improper. Viewed in this context, the Commonwealth cannot even be said to have engaged in willful prosecutorial misconduct, much less misconduct necessitating the discharge of appellant. As such, appellant's double jeopardy claim fails. *See Commonwealth v. Santiago,* 439 Pa. Super. 447, 654 A.2d 1062 (1994) (to raise double jeopardy implications, prosecutorial misconduct must be deliberate, undertaken in bad faith and with the specific intent to deny defendant a fair trial); *Commonwealth v. Rightly,* 421 Pa. Super. 270, 617 A.2d 1289 (1992)(prosecutorial conduct will not bar retrial on double jeopardy grounds in the absence of evidence that prosecutor made remarks intending to deprive defendant of a fair trial).

Appellant next contends that he was prejudiced when he was not informed of the identity of Commonwealth witness Ricardo Kelsey, his prior statements and his proposed testimony, until just before

this witness took the stand. Kelsey was the subject of a protective order, under Pa.R.Crim.P. 305F, and thus his identity and testimony were not discoverable prior to trial. His testimony concerned an alleged confession to the victim's murder by appellant. The protective order was granted by the trial court because appellant had threatened to kill Kelsey if he cooperated with the Commonwealth.

Rule 305 F provides:

> F. Protective Order
>
> Upon a sufficient showing, the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. Upon motion of any party, the court may permit the showing to be made, in whole or in part, in the form of a written statement to be inspected by the court in camera. If the court enters an order granting relief following a showing in camera, the entire text of the statement shall be sealed and preserved in the records of the court to be made available to appellate court(s) in the event of an appeal.

Here, appellant does not challenge the court's application of Rule 305F. Rather, he focuses on the alleged prejudice he has suffered due to the late disclosure of this witness. Our review of the record

reveals no error in the court's action. Moreover, appellant was aware of Kelsey prior to trial, as trial counsel admitted that Kelsey had testified against appellant at a preliminary hearing in a unrelated case. Appellant also alleges error with respect to denying him testimony of Kelsey in other unrelated cases and in the deal struck between Kelsey and the Commonwealth. The former allegation has no support in the record and is, in any event, a collateral matter and thus irrelevant. As to the latter allegation, the scope of Kelsey's cooperation and favorable treatment by the Commonwealth was revealed at trial. As such, this issue is also meritless.

Appellant next contends that trial counsel was ineffective in failing to object to numerous comments made by prosecutor.

> Our standard of review for allegations of ineffective assistance of counsel is well-established and quite narrow. Ineffectiveness claims are subject to a three-part analysis. First, it must be demonstrated that the underlying claim is of arguable merit. Next, it must be determined whether counsel's choice of action had some reasonable basis designed to effectuate his or her client's interests. Finally, a showing must be made of how counsel's choice of action prejudiced the client. *Commonwealth v. Tavares,* 382 Pa. Super. 317, 321, 555 A.2d 199, 201 (1989), *allocatur denied,* 524 pa.

> 619, 571 A.2d 382 (1989). Prejudice in the context of a claim of ineffective assistance of counsel is determined by an evaluation of whether "but for the arbuably ineffective act or omission there is a reasonable probability that the result would have been different." *Commonwealth v. Petras,* 368 Pa. Super. 372, 376, 534 A.2d 482, 485 (1987). The law presumes that counsel was effective, so that the burden of establishing ineffectiveness rests squarely upon the defendant. *Commonwealth v. Smith,* 380 Pa. Super. 619, 624, 552 A.2d 1053, 1056 (1989), *allocatur denied,* 525 Pa. 581, 575 A.2d 112 (1990). Counsel will not be deemed ineffective for failing to assert a baseless claim. *Commonwealth v. Cook,* 383 Pa. Super. 615, 623, 557 A.2d 421, 425 (1989). Moreover, in making assertions of ineffectiveness, a claimant must allege sufficient facts upon which a reviewing court can conclude that trial counsel may have been ineffective since the appellate courts will not consider such claims in a vacuum. *Commonwealth v. Durst,* 522 Pa. 2, 4, 559 A.3d 504, 505 (1989).

Commonwealth v. Donahue, 428 Pa. Super. 259, 630 A.2d 1238, 1249-50 (1993).

In evaluating the statements of a prosecutor, the statements cannot be viewed in isolation but must be

evaluated in the context in which they were made. *Commonwealth v. Cottam,* 420 Pa. Super. 311, 616 A.2d 988 (1992). The arguments advanced by the prosecutor must be confined to the evidence and the legitimate inferences therefrom. *Id.* The prosecutor, however, is accorded reasonable latitude in fairly presenting his version of the case to the jury, and in rebutting arguments made by the defense in its summation. *Id.* A new trial will only be required when the unavoidable effect of the prosecutor's comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that jurors could not weigh the evidence and render a true verdict. *Commonwealth v. Faulkner,* 528 Pa. 57, 77, 595 A.2d 28, 39 (1991).

Appellant cites the following statements by the prosecution as constituting prosecutorial misconduct:

1. That if the basement floor and walls could take they would say appellant was responsible for the victim's death.

2. Called appellant a liar and gave his personal opinion of appellant's veracity.

3. Referred to the killing as a "slaughter" and an "annihilation."

4. Referred to appellant as a "vampire".

5. Asked the jury to find appellant guilty so that the victim's soul could rest in peace.

6. Remarked that appellant was a "beast", "inhumane" and "heartless"; and equated the killing to "animal abuse" and "war crimes".

After reviewing each of the alleged instances of misconduct, and in consideration of the extraordinarily brutal nature of the killing, we conclude that appellant has either taken the comments of the prosecution out of context or misstated the controlling caselaw. After examining these comments in context and in light of our caselaw, we cannot conclude that they created bias and hostility on the part of the jury such that is could not render a true verdict. As such, this ineffectiveness claim fails.

Appellant next contends that trial counsel was ineffective for failing to request a cautionary instruction with respect to the introduction of other crimes evidence. At trial, appellant took the stand and testified that he had twice been convicted of bank robbery. He did so in order to prevent the Commonwealth from first bringing out this fact on cross-examination as crimen falsi. We first note that this claim was not raised in post-trial motions and is thus waived. In any event, the two prior robberies and the murder at issue in this case are completely different crimes and the former crimes do not sug-

gest a propensity to commit a grisly murder. We need not decide whether appellant has waived any right to a cautionary instruction by reason of the tactical decision to disclose the crimes. The evidence of appellant's guilt was overwhelming and the failure to request a cautionary instruction did not alter the outcome. *Cf. Commonwealth v. Sam,* 535 Pa. 350, 635 A.2d 603 (1993) (where evidence of guilt is overwhelming and crimes are dissimilar, no prejudice to defendant where limiting instruction is not given). Thus, this ineffectiveness claim also fails.

Appellant next contends that trial counsel was ineffective for failing to object to the testimony of a homicide detective that appellant was known to police. The mere fact that a police witness has had prior contact with the defendant, even in his capacity as a law enforcement officer, does not, in itself, imply a prior criminal record or prior criminal activity. *Commonwealth v. West,* 440 Pa. Super. 575, 656 a.2d 519 (1995). Here, the officer simply testified that appellant was known to him through his experience as a homicide detective. There was no reference to specific criminal activity or appellant's involvment in such. This issue is meritless.

Finally, appellant contends that trial counsel was ineffective in failing to use a statement, given by Commonwealth witness Kelsey to police, to impeach Kelsey when he took the stand and testified. Appellant maintains the statement was relevant to Kelsey's motive to cooperate. The statement concerned

Kelsey's request for help in staying out of certain prisons because he was concerned about being killed by persons against whom he had given information to police. Kelsey had cooperated with regard to several individuals and this statement did not specifically name appellant.

We first note that this claim was not raised in post-trial motions and is therefore waived. In any event, the record reveals that counsel was concerned that inquiry into this area would prejudice appellant. The revelation that Kelsey was fearful that appellant would kill him would, indeed, be prejudicial to appellant's interest. We, thus, conclude that counsel had a reasonable basis for not impeaching Kelsey with this statement and that this ineffectiveness claim also fails.

Judgment of sentence affirmed.

APPENDIX B – OPINION, FILED MARCH 25, 2002

IN THE COURT OF COMMON PLEAS
PHILADELPHIA COUNTY
CRIMINAL DIVISION

Commonwealth of PA	:	July Term, 1974
v.	:	Nos. 2079-2081
Charles Diggs	:	PCRA

OPINION

FACTS:

On February 12, 1974, Linda DeBose, Who was then an Eighteen Year Old African American young Woman was Stabbed Approximately 69 times in the basement of the house where she lived at 1816 Medary Avenue. Petitioner, Charles Diggs and two co-defendants, Louis Riggins and Alfred Clark were arrested and charged with her killing. Each was tried produced a conviction for First-Degree Murder. After Mr. Diggs exhausted his Direct Appeals, he sought relief in the Federal Court. That court issued a Writ of Habeas Corpus and the Federal Court ordered a new trial due to a "Batson" violation. Mr. Diggs was Tried the 4th Time in Pennsylvania Court. Mr. Diggs

was again convicted of First Degree murder and again exhausted his Direct Appeals. He Filed this petition pursuant to the Post Conviction Relief Act, 41 Pa. C.S.A., Section 9541, et seq. Michael J. Stack, Esquire was appointed to represent defendant at the first trail. The honorable William J. Mazzola, who at the time was an associate of Mr. Stack, represented him at the Suppression Hearing Held on August 24, 1976. Mr Stack took over the Voir Dire. The Honorable Theodore B. Smith, Jr. Presided over the Trial and the Commonwealth was represented by Barbara Christi, Esquire. A Mistrial was declared after ten jurors were selected.

The second trial began with Voir Dire on November 29, 1976. The honorable Robert A. Latrone presided over the trial. ADA, Barbara Christie, again represented the Commonwealth. Defendant was represented by Daniel Preminger, Esquire. After ten days of Jury Selection and five days of trial, mistrial was declared, when there was fond in the jury room a newspaper article printed in the inquirer which referred to this trial.

The third trial began with Voir Dire on October 12, 1977. the Honorable Edwin S. Malmed presided over the Trial. Again, Ms. Christie was the prosecuting attorney. Defendant was represented by James A. Peruto, Esquire. The jury found defendant guilty of all charges on November 3, 1977.

Norris Gelman, Esquire represented defendant in federal court on a petition for Writ of Habeas Corpus in which the court ruled that black veniremen were systematically excluded from the jury. The Honorable John P. Fullam ordered that a new trial be held. (Batson v. Kentucky 476 U.S. 79(S. Ct. 1986)

The victim was found by her mother, as she lay on the floor bleeding profusely.

As she was dying, the victim told her mother that the Muslims had done this to her and she named defendant as one of her attackers. Her mother called the police.

Because of the obvious severity of the victim's injuries, Philadelphia Police Officer, William Fielder questioned her about the attack while waiting for rescue personnel. The victim stated that Louis Riggins', brother, Alfred and brother Charles (this defendant) had stabbed her. She told the officer that the three men lived in Frankford and were Muslims from the he Susquehanna Mosque. He recorded these statements on a napkin. The victim, then, lost consciousness and was transported to the hospital where she died at 4:00 a.m.

Co-defendant, Riggins was arrested within three hours of the murder and had items of identification in defendant's name.

Although the police attempted to locate defendant immediately, defendant was not arrested until 41/2

months later on June 30, 1974. following his release on bail, defendant fled.

On May 17, 1976, defendant was arrested in Philadelphia on unrelated Federal Charges. At that time, in addition to this Murder Charge, defendant was also charged with Murder and Kidnapping in Dauphin County, Pennsylvania and he was wanted on Federal bank Robbery Charges in both Pennsylvania and New Jersey.

Defendant was tried the 4th time in October of 1991 by a jury sitting with the Honorable Juanita Kidd Stout. On October 15, 1991, the jury convicted defendant of First Degree Murder and Criminal Conspiracy. Defendant was represented at trial by Norris Gelman, Esquire who also was his lawyer in Federal Court. The commonwealth was represented by Assistant District Attorney, Roger King. Mr. King presented, inter alia testimony from Richardo Kelsey, who testified that defendant had confessed to him that he was involved in Linda DeBose's murder. The defendant also threatened to kill him, if he testified, thus a Protective Order was issued.

After trial, defendant filed pro se motions alleging ineffective assistance of Mr. Gelman. New counsel, Thomas Moore, Esquire was appointed. Despite the appointment of counsel, defendant chose to represent himself, and appointed counsel served as back-up counsel throughout the Post Verdict Proceedings. On February 28, 1994 testimony was presented and

argument was heard on defendant's Post Verdict Motions. On September 7, 1994, the motions were denied and defendant was sentenced to Life Imprisonment on the Murder Bill, consecutive to any sentences he was currently serving. Sentence was suspended on all other bills.

Defendant appealed, and the Superior Court affirmed on August 15, 1996. Commonwealth v. Diggs, No. 3664, Philadelphia 1994 (Pa. Super., filed Aug. 145, 1996) Defendant was represented by John T. Drost, Esquire. The Pennsylvania Supreme Court denied allocatur on July 14, 1997. The United States Supreme Court denied defendant's petition for Writ of Certiorari on February 23, 1998.

On January 27, 1999, defendant filed a pro-se petition for Post Conviction Relief pursuant to the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A., Section 9541, et seq. (Eff. Jan. 16, 1996). Eileen Epley Wiggins was retained and filed an Amended Petition on October 10, 2000 and a second petition and a brief in support of that petition on April 10, 2001.

LEGAL ARGUMENTS

1. Lack of a Colloquy At the Post Verdict Motions Hearing of His 4th Trial.

Defendant first claims that he was denied his right to counsel on Post Verdict Motions. Defendant was represented at trial by Norris Gelman, Esquire. Mr. Gelman also represented defendant in Federal

Court where he successfully argued that defendant was entitled to a new trial. At the conclusion of trial, defendant "discharged Mr. Gelman so that he could claim ineffective assistance of counsel if appropriate."

New counsel, Thomas Moore, Esquire was appointed to represent defendant at the Post Verdict stage in this case and at trial in an unrelated Homicide Case. Defendant decided that he wanted to represent himself in both cases. Defendant, then, filed pro-se Post Verdict Motions and Mr. Moore served as back-up counsel at the Post Verdict Hearing held February 28, 1994. Defendant was again represented by counsel on appeal.

On appeal, appellate counsel did not object to the absence of a Colloquy at the Post Verdict Hearing. Accordingly, this claim is waived. See Commonwealth v. Hubbard, 471 Pa. 259, 372 A.2d 687 (1977) (an accused must raise allegations of Ineffective Assistance of Counsel at first stage of proceeding in which he is represented by new counsel). Defendant claims, however, that appellate counsel was ineffective. Counsel is presumed to have acted in his client's best interest; it is the defendant's burden to prove otherwise. E.g., Commonwealth v. Hancharik, 534 pa. 435, 633 A.2d 1074, 1079 (1993). Every defendant who accuses a former lawyer of ineffectiveness must show that counsel's representation fell below "an objective standard of reasonableness." Strickland v. Washington, 466 U.S. 668, 688, 104

S.Ct. 2052 (1984); Commonwealth v. Morris, 492 Pa. 565, 424 A.2d 1336, 1338 (1981).

When a violation of Pa. R.Crim. 318 (waiver of counsel) occurs, relief is warranted, only if, the appellant suffers actual prejudice as a result thereof. Commonwealth v. Davis, 393 Pa. Super. 88, 101, 573 A.2d 1101, 1107 (1990); Defendant must prove, inter alia, that he was prejudiced by counsel's conduct. Defendant's failure to establish any prejudice, therefore, is a competent reason to deny his claim.

2. Double Jeopardy Claim

Defendant stated that the court erred in denying his motion to dismiss on Double Jeopardy grounds due to the Batson Claim. The Superior Court considered and rejected this very claim on Direct Appeal. Commonwealth v. Diggs, supra slip op. at 2-4.

This issue has been previously litigated where the highest appellate court in which the petition could have had a review as a matter of right ruled on the merits of the issue. 42 Pa.C.S.A., Section 9544 (a) (2). See, e.g., Commonwealth v. Lesko, 509 Pa. 67, 501 A.2d 200 (1985), cert. denied., 479 U.S. 1101, 107 S.Ct. 1328 (1987); An issue may not be relitigated merely because a new or different theory is asserted as a basis for reexamining an issue that has already been decided. Commonwealth v. Senk, 496 Pa. 630, 437 A.2d 1218, 1220 (1981); Commonwealth v. Tenner, 377 Pa. Super. 540, 547 A.2d 1194, 1197,

appeal denied, 522 Pa. 603, 567 A.2d 826 (1989). The defendant is not entitled to PCRA Relief.

3. Training Tape By D.A., McMahon

Defendant claims that the state Appellate Courts and the Federal Court were unaware of the training tape that was prepared by former Assistant District Attorney, Jack McMahon in 1987 and released by the District Attorney's Office in 1997, when those Courts ruled that the Commonwealth did not intentionally attempt to deny defendant a fair trial, when selecting the jury before Judge Malmed. The Supreme Court has specifically ruled that the "tape itself would not suffice to establish a pattern or practice of discrimination on the part of the office of the District Attorney in general or by Assistant District Attorneys other that Mr. McMahon." Commonwealth v. Basemore, 744 A.2d 717, 731 (Pa. 2000) (emphasis supplied); see also Commonwealth v. Rollins, 738 A.2d 435, 443, n.10 (Pa. 1999) (existence of 1987 training tape does not demonstrate that there was discrimination in appellant's case). This trial was ten years before the tape in question was made. Defendant claims on this Double Jeopardy issue has been previously and finally litigated. No further relief is required for this reason.

4. A. Witness Who Was The Subject Of A Protective Order.

Defendant claims, as he did on appeal, that he was prejudiced, when he was not informed of the identity of Commonwealth witness Ricardo Kelsey, who was the subject of a Protective Order. This witness was protected, because defendant had threatened to kill him. The Superior Court considered and rejected this claim on Direct Appeal. Commonwealth v. Diggs, supra, slip op. At 4-5. No further review is required. Commonwealth v. Lesko, supra; Commonwealth v. Jones, supra.

5. Accomplice Liability and Criminal Conspiracy

Defendant alleges trial counsel failed to object to the Jury Instructions regarding Justice Stout's Jury Instruction on Accomplice Liability and Conspiracy. Defendant never raised it on appeal. 42 Pa.C.S., Section 9543 (a)(3); 9544 (b). Trial counsel was not ineffective in this respect.

Defendant claims that the charge did not adequately inform the jury that both the person and persons who actually inflicted the fatal wounds and the accomplices or co-conspirators to First Degree Murder must have the specific intent to kill the victim.

On the Accomplice Liability Charge, Justice Stout specifically instructed the jury that: "To aid and abet

in the commission of a crime, one must possess a shared intent to commit it" (N.T. 10/24/91, 398). The Court, also instructed the jury that a Criminal Homicide constitutes murder of the First Degree, when it is committed by an intentional killing. The court defined an intentional killing by stating:"

> A killing is willful and deliberate, if the defendant consciously decided to kill the victim, and it is premediated if the defendant possessed a fully-formed intent to kill at the time when he acted...N.T. 10/24/91, 391-92.

These instructions explained to the jury that in order to convict this defendant of First Degree Murder as an accomplice, the jury must find that defendant had the specific intent to kill.

On the Conspiracy Charge, the Court instructed the jury, by quoting the Standard Jury Instruction 12,903 a, as follows:

> A person is guilty of conspiracy with another person or persons to commit a crime if, with the intent of promoting or facilitating its commission, he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or agrees to aid such other person or persons in the planning or commission of such crime.

> No explicit or formal agreement need be shown, however, in order to establish a Criminal Conspiracy. The agreement may be inferred from concerted actions. The essence of every Criminal Conspiracy is a common understanding.
>
> Where two or more join in the commission of an unjustified assault which results fatally, all are guilty, regardless of which one inflicts the mortal wound. Where two or more combine to make an assault, and in carrying out such common purpose another is killed, the one who enterers into the combination, but does not personally commit the wrongful act is equally responsible for the Homicide as the one who directly causes it. N.T. 10/24/91, 395-97.

The Court's charge on First Degree Murder, all of when combined with the Accomplice Liability and Conspiracy Charge, which explained the concept of specific intent to kill, clearly conveyed to the jury that to convict defendant of First Degree Murder, as a co-conspirator, the jurors must find that defendant had the specific intent to kill. The instruction was proper and defendant's claim is without merit.

6. Life Sentence to Run Consecutive To Another Life Sentence

Defendant next contends that Justice Stout erred in sentencing him to a Life Sentence to run consecutive to another Life Sentence that he was serving. Defendant notes that Judge Malmed originally ordered that he serve his Life Sentence concurrent to another Life Sentence he was serving. Defendant, then, argues, that North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. (1969), prohibits imposition of a more severe sentence following a new trial unless the more severe sentence is based on "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." Id. at 726, 89 S.Ct. at 2081.

This claim is waived –it was not raised on appeal – and, thus, not a proper subject for collateral review. In any case, it is meritless.

In a similar situation in Commonwealth v. Mikesell, 371 Pa. Super. 209, 537 A.2d 1372 (1988), following his second trial, Mikesell was sentences to two Life Terms to run concurrently. Mikesell successfully appealed, resulting in a third trial. A different judge presided over Mikesell's third trial and sentenced Mikesell to two Life Terms to run consecutively. Mikesell appealed, and the Superior Court affirmed the Judgments of Sentence.

The Court reasoned as follows:

We hold, however, that appellant is not entitled to relief. The United States Supreme Court recently reinterpreted its holding in North Carolina v. Pearce. In Texas v. McCullogh, 475 U.S. 134, 137-40; 106 S.Ct. 976, 978-80, 89 L.Ed.2d 104, 110-12 (1986), the Court stated:

In North Carolina v. Pearce, supra, the Court placed a limitation on the power of a sentencing authority to increase a sentence after reconviction following a new trial. It held that the Due Process Clause of the Fourteenth Amendment prevent[s] [an] increased sentence, when that increase was motivated by vindictiveness on the part of the sentencing judge...Beyond doubt, vindictiveness of a sentencing judge is the evil the Court sought to prevent rather than simply enlarge sentences after a new trial. The Pearce requirements, thus, do not apply in every case, where a convicted defendant receives a higher sentence on retrial.

The presumption [of vindictiveness] is also inapplicable, because different sentences assessed the varying sentences the McCullogh received. In such circumstances, a sentence "Increase" cannot truly be said to have taken place.

Following appellant's successfully appeal, he was tried before, and sentenced by a different judge than the one who had imposed the original sentence. McCullogh, supra, makes is clear that no presumption of vindictiveness applies in these circumstances. In the absence of a presumption, "the defendant must affirmatively prove actual vindictiveness." Wasman v. United States, 468 U.S. 559, 569, 104 S.Ct. 3217, 3223, 82 L.Ed. 2d 424, 433 (1984). Appellant has not attempted to prove actual vindictiveness and nothing in the record suggest that Judge Lewis was motivated by actual vindictiveness. We, therefore, hold that no due process violation occurred and that the appellant is not entitled to resentencing. Mikesell, supra, 371 Pa. Super. At 225-226.

In this case, there were two different sentencing judges. Thus, the burden is on defendant to show actual vindictiveness on the part of the second judge, Justice Stout.

Like the appellant in Mikesell, defendant has not attempted to prove actual vindictiveness, and nothing in the record suggests that Justice Stout was motivated by actual vindictiveness. Accordingly, there was no Due Process Violation and defendant is not entitled to resentencing.

7. Claimed Discrimination In Jury Selection

Systematically excluding young African American men from the jury is another claim that is waived.

An issue has been waived "if the petitioner could have raised it, but failed to do so before trial, at trial, on appeal or in a prior State Post Conviction Proceeding." 42 Pa.C.S.A., Section 9544 (b). Here, defendant failed to raise a Batson Claim either during voir dire or on appeal. Hence, the claim is waived. See Commonwealth v. Philistine, No. 252 Capital Appeal Docket (S.Ct., July 16, 2001) (appellant waived Batson claim by failing to raise it at trial); Commonwealth v. Abu-Jamal, 521 Pa. 188, 555 A.2d 846 (1989).

Defendant had not sustained his burden of proving that the Commonwealth used its peremptory challenges in a discriminatory manner. To prevail on a Batson Claim, a defendant must first establish a prima facie case of discrimination by showing that the prosecutor used peremptory challenges to exclude prospective jurors solely, because of their race. Batson v. Kentucky, supra. It is only where a defendant establishes a prima facie case of discrimination, that the burden then shifts to the prosecutor to articulate "a neutral explanation related to the particular case to be tried" for exercising his right to peremptory challenge against certain jurors. Batson v. Kentucky, supra.

Defendant claims that the prosecutor, Assistant District Attorney, Roger King, struck all young African American males for the jury. Defendant concedes that he cannot prove this claim, because the Notes of Testimony from Voir Dire were not transcribed. This issue was never raised on appeal. Obviously trial counsel did not believe a "Batson" issue existed.

Defendant's failure to make a record is fatal to his claim. In order to establish a Batson Claim, defendant must set forth the race of the entire venire, the race of the petit jury, the race of those struck by the Commonwealth and the race of those struck by the defense. Defendant has not set forth either the race of the entire venire, the race of the jurors struck by the Commonwealth, or the race of the jurors struck by the defense. See Commonwealth v. Holloway, 739 A.2d 1030 (Pa. 1999) (appellant failed to make a record "identifying the race of venire persons stricken by the Commonwealth, the race of prospective jurors acceptable to the Commonwealth, but stricken by the defense, and the racial composition of the final jury selected.") Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999)

Before taking the verdict, Justice Stout asked each member of the jury to indicate his or her race. Defendant's jury was comprised of six Black Jurors, four White Jurors and two Hispanic Jurors (N.T. 10/25/91, 422). Clearly, defendant has utterly failed to present a cognizable Batson claim.

8. Clothing At Trial

Defendant contends that he was forced to stand trial in prison clothing. This claim is waived. Defendant failed to raise it on appeal. 42 Pa.C.S., Section 9543 (a); 9544 (b). This claim is also without merit.

> What happened, they said that the institution didn't have any clothes for me, and Mr. Gelman let me wear his suit jacket. After the second or third day of the trial, on the third day, a lady by the name of Rose Spragen brought me a set of clothes and that is how I had clothes for the trial. N.T. 2/28/94, 48).

Justice Stout indicated at the Post Verdict Hearing that she never noticed that defendant was in prison clothes: "if you were in prison clothes, I couldn't tell it" (N.T. 2/28/94, 47).

In response, Justice Stout stated:

> I am very careful about that. I do not allow people in with anything that can be recognized as prison clothing. A white shirt is not necessarily recognizable as prison attire. This claim has no merit.

9. Defendant, Alfred Clark, Had Been Acquitted

Defendant contends that he should have been allowed to introduce evidence that co-defendant, Alfred Clark, had been acquitted of the Murder of Ms. DeBose. However, trial counsel never sought to introduce this evidence. Nor did, appellate counsel raise a claim of trial counsel's ineffectiveness in this respect on appeal. Hence, this claim is waived. 42 Pa.C.S., Section 9543 (a)(3); 9544 (b).

A criminal defendant may not introduce evidence of the acquittal of another person charged in connection with that crime to create an impression before the jury that the defendant is equally innocent. See e.g. Commonwealth v. Graham, 467 P. 417, 421, 358 A.2d 56 (1976) (fact that appellant's co-felon had been acquitted in a previous trial was irrelevant and inadmissible); Commonwealth v. Amato, 449 pa. 592, 297 A.2d 462 (1972) This claim was not presented to the trial court, but if it had been, the trial court would have correctly ruled that it would not permit appellant to introduce evidence that his co-defendant had been acquitted in order to show that he was equally innocent.

The challenge evidence was irrelevant. Therefore, counsel cannot be deemed ineffective for failing to make a frivolous motion. See Commonwealth v. Groff, 356 Pa. Super. 477, 514 A.2d 1382, 1386 (1986), appeal denied, 531 A.2d 428 (Pa. 1987)

(counsel is never ineffective for failing to make frivolous objection).

10. Trial Counsel Cannot Be Deemed Ineffective For Not Asking Defendant About His Alibi

Defendant claims that trial counsel was ineffective for not asking him about his alibi, when he took the stand at trial. Defendant waived this claim by failing to raise it on Direct Appeal, when he was represented by new counsel. 42 Pa.C.S., Section 9543(a); 9544.

This issue was raised at the Post Verdict Hearing and Mr. Gelman testified that he had been unable to find anyone in Harrisburg to testify to defendant's whereabouts at the time of the crime. (N.T. 2/28/94, 21). Defendant concedes that Mr. Gelman was unable to locate any alibi witnesses in the affidavit attached to his Amended Petition filed October 10, 2000. Mr. Gelman could not recall why he did not ask the defendant himself about his alibi, when defendant was on the stand. (Id.) Any allegation of ineffectiveness must show that counsel's representation fell below "an objective standard of reasonableness." Strickland .v Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984); Commonwealth v. Morris, 492 Pa. 565, 424, A.2d 1336, 1338 (1981). Counsel cannot be found ineffective unless his conduct was so lacking in reason that "in light of all the alternatives available, no competent lawyer would

have chosen it." Commonwealth v. Albrecht, 510 Pa. 603, 511 A.2d 764, 776 (1986) (emphasis added), cert. denied, 480 U.S. 951, 107 S. Ct. 1617 (1987). "[A] defendant is required to show that counsel's ineffectiveness was of such magnitude that the verdict essentially would have been different absent counsel's alleged ineffectiveness." Commonwealth v. Howard, 538 Pa. 86, 100, 645 A.2d 1300, 1308 (1994), citing Commonwealth v. Pierce, 515 Pa. 153, 161, 527 A.2d 973 (1987)/

The defendant stated that these alleged alibi witnesses were not available to testify at his 1991 trial. This issue had no merit.

11. Manner In Which the Prosecutor Questioned Ricardo Kelsey

Defendant contends that trial counsel was ineffective for failing to object to the manner in which the prosecutor questioned Commonwealth witness, Rechart Kelsey. Defendant has waived this claim by failing to raise it on Direct Appeal. 42 Pa.C.S., Section 9543 (a); 9544.

District Attorney Roger King brought out on direct examination of Kelsey that defendant had confessed to Kelsey that he and two others had stabbed Linda DeBose to death (N.T. 10/22/92, 196, 200). Kelsey pleaded guilty to a double homicide (N.T. 10/22/91, 196-198). Defendant argues that the prosecutor's ex-

amination of Kelsey led the jury to believe that defendant was also involved in the double homicide.

Mr. Kelsey did not suggest in any way that defendant had anything to do with the double homicide to which Kelsey pleaded guilty. The law presumes that a jury reasonably and logically interprets what it heard according to its plain meaning and does not engage in convoluted mental gymnastics to reach an illogical interpretation. Commonwealth v. Henderson,497 Pa. 23, 38, 438 A.2d 951 (1981); Commonwealth v. Brightwell, 497 Pa. 541, 545-46, 388 A.2d 1063, cert. denied. 439 U.S. 989 (1978). Trial counsel cannot be deemed ineffective for failing to lodge a baseless objection. See Commonwealth v. Groff, 356 pa. Super. 477, 514 A.2d 1381, 1386 (1986), appeal denied, 531 A.2d 428 (Pa. 1987). This issue is without merit.

12. Not Entitled To A Hearing Based Upon Hearsay From Fellow Inmates.

Defendant has provided affidavits from fellow inmates, Charles Giles and Timothy VanHood. Neither affidavit warrants an Evidentiary Hearing or any other relief.

The affidavit dated August 6, 2000, by Charles Giles states that Rechart Kelsey told him some time before the defendant's 1991 trial "that some homicide detectives and the District Attorney wanted him to testify against Charles Diggs..." Giles further

claimed that Kelsey told him he had to testify or he would be incarcerated "forever". Giles does not state in his affidavit that Kelsey told him he was lying about defendant's confession. This is not exculpatory evidence.

In an affidavit dated August 23, 2000, inmate, Timothy VanHook claims that he spoke to Rechart Kelsey on February 5, 2000, while the two men were housed together in S.C.I. Rockview. As with Giles, VanHook does not state that Kelsey told him that he lied at defendant's trial. The evidence offered was merely opinion testimony which would not have been admissible at trial.

In summary, the testimony from these men about what Kelsey supposedly said to them while they were in prison together is hearsay, i.e., an out-of-court statement offered to prove the truth of the matter asserted. See e.g. Commonwealth v. Cassidy, 315 Pa. Super. 429, 462 A.2d 270 (1983). Neither Giles or VanHook can offer any testimony regarding the veracity of Kelsey's statement. A Protective Order was granted by the trial court, because defendant had threatened to kill Kelsey, if he cooperated with the Commonwealth. See Commonwealth v. Diggs, slip op. at 4; N.T. 10/22/91, 202). Ten years after trial, Kelsey now says, that he testified, because he had been threatened by police and prosecution. Defendant is not entitled to any relief based on this hearsay.

13. Ineffective Assistance of Appellate Counsel

Defendant claims that appellate counsel was ineffective for not raising the majority of the claims defendant raised in his Amended Petition. It is well-settled that counsel decides which issues to raise on appeal. There is no duty to raise every possible claim. An exercise of professional judgment is required. Appealing losing issues is risky, because it may over-shadow other arguments. The process of winnowing out weaker arguments on appeal and focusing on those arguments on which a defendant is most likely to prevail is the hallmark effective advocacy. See Jones v. Barnes, 463 U.S. 745, 751-753, 103 S.Ct. 3308 (1983); Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661 (1986) (quoting Jones, 463 U.S. At. 751-753); Commonwealth v. Laboy,, 460 Pa. 466, 333 A.2d 868 (1975).

Appellate counsel in this case pursued the claims he believed had the most chance of success. The fact that he did not raise numerous meritless claims does not show that he was ineffective; to the contrary, it shows that he was able to "winnow out" the weaker arguments and focus on those claims on which he believed defendant was most likely to prevail. As the United States Supreme Court wrote in Jones v. Barnes, supra., this is the hallmark of effective advocacy.

Prior counsel cannot be deemed ineffective for not preserving meritless claims.

See Commonwealth v. Thuy, 424 Pa. Super. 482, 623 A.2d 327, 335 (1993); Commonwealth v. Tanner, 410 Pa. Super. 398, 600 A.3d 201 (1991)

CONCLUSION

For all of the foregoing reasons, the P.C.R.A. Petition was properly dismissed.

BY THE COURT:

_____, J.

APPENDIX C – OPINION, FILED APRIL 19, 2005

NON-PRECEDENTIAL DECISION – SEE SUPERIOR COURT I.O.P. 65.37

Commonwealth of PA	: In the Superior Ct. of
Appellee	: Pennsylvania
v.	:
Charles Diggs,	: No. 570 EDA 2002
Appellant	:

Appeal from the PCRA Order January 8, 2002
In the Court of Common Pleas of
Philadelphia County
Criminal at No.: 74-07 2079

BEFORE: STEVENS, MUSMANNO, and OLSZEWSKI, JJ.

MEMORANDUM: FILED APRIL 19, 2005

Appellant, Charles Diggs, appeals from the January 8, 2002 order entered in the Court of Common Pleas of Philadelphia County, dismissing his petition brought under the Post Conviction Relief Act (PCRA), 42 Pa.C.S.A. §§ 9541-9546. On October 10, 2003, this Court affirmed the PCRA court's order, finding thirteen of the fourteen issues raised by Ap-

pellant to be waived due to Appellant's failure to file properly a court-ordered Pa.R.A.P. 1925(b) statement with the clerk of courts.[1] Appellant filed a petition for reconsideration, which we denied, and Appellant subsequently filed a petition for allowance of appeal to the Supreme Court, which the Supreme Court granted by order dated September 16, 2004. The case was remanded to this Court with directions that we addressed the issues raised by Appellant in his Pa.R.A.P. 1925(b) statement, which the Supreme Court concluded was field on February 28, 2002.[2]

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[1] This Court addressed Appellant's contention that the PCRA court should have held a hearing regarding affidavits submitted by two witnesses and found the issues to be meritless. We concluded that the issue was preserved because it was raised in a Pa.R.A.P. 1925(b) "addendum," which was properly filed with the clerk of courts.

[2] We note that, aside from the Pa.R.A.P. 1925(b) "addendum" discussed in our original unpublished memorandum, there is no Pa.R.A.P. 1925(b) statement in the certified record. However, Appellant has attached to his brief a Pa.R.A.P. 1925(b) statement. In light of the Supreme Court's order, we shall consider the Pa.R.A.P. 1925(b) statement, which is attached to Appellant's brief. To the extent a particular issues is not included in Appellant's brief. To the extent a particular issue is not included in Appellant's P.a.R.A.P. 1925(b) statement, the Supreme Court's order does not preclude this Court from finding waiver under Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 206 (1999).

Appellant now raises twelce issues on appeal. We affirm.

> On February 12, 1974, eighteen-year-old Linda DeBose was brutally stabbed to death in the basement of her home on Medary Avenue in Phil. When Linda's mother, Alice DeBose, returned home from work at approximately 11:20 p.m. on the evening of February 12th, she found her daughter lying in a pool of blood. She immediately called the police who arrived shortly thereafter.[3] Linda DeBose was rushed to Albert Einstein Medical Center where she had later died. Prior to her death, however, Linda DeBose was able to identify her attackers by name to both her mother and the police.
>
> Within three hours of the murder, the Philadelphia police arrested Appellant's co-conspirator, Louis Riggins. Appellant was arrested two years later in Chester, Pennsylvania, where he had been hiding under several assumed names. Subsequent to his arrest, Appellant was released on bail but again fled and eluded authorities for an ad-

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[3] Trial testimony revealed that Linda DeBose was stabbed approximately sixty-nine times in the throat, arms, and upper body, and she was left to die.

ditional two years. He was arrested again in Philadelphia on May 17, 1976.

Appellant was found guilty in 1977, after a trial by jury of first degree murder, criminal conspiracy, possession of an instrument of crime, and prohibited weapons.[4] He was sentenced to life imprisonment. In 1991, Appellant was granted federal habeas corpus relief on the grounds that his 1977 jury trial the prosecution had systematically excluded black venire persons by challenging them solely on the basis of race. A new trial was ordered pursuant to Batson v. Kentucky, 476 U.S. 79 (1986).[5] Appellant was retried in October of 1991, he was sentenced to life imprisonment for murder. Sentences

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[4] 18 Pa.C.S.A. §§ 2502(a), 903, 907, and 908, respectively. Two mistrials occurred in Appellant's case before he was convicted in 1977. Appellant's first trial ended at his insistence to allow him to bring new counsel into the case. The second trial ended in a mistrial when members of the jury were exposed mid-trial to newspaper coverage of Appellant's case.

[5] Although Appellant's conviction occurred in 1977, his direct appeal from the judgment of sentence of life imprisonment was still pending when the United States Supreme Court decided Batson.

for Appellant's other convictions were suspended.[6]

On direct appeal, this court affirmed the judgments of sentence on August 15, 1996, and the Pennsylvania supreme Court denied allowance of appeal of July 14, 1997. Commonwealth v. Diggs, No. 3664 Philadelphia 1994 (Pa.Super. filed 8/15/96) (unpublished memorandum), appeal denied, 548 Pa. 666, 698 A.2d 592 (1997). The United States Supreme Court denied certiorari on February 23, 1998. Diggs v. Pennsylvania, 522 U.S. 1123 (1998).

Appellant filed a timely PCRA petition on January 27, 1999, and counsel was appointed. Multiple assignments and withdrawals of counsel followed until Appellant privately retained Eileen Eply Wiggins, Esquire, in June 2002. Attorney Wiggins filed an amended PCRA petition on October 10, 2000, and a second amended PCRA petition on April 10, 2001. The Commonwealth filed

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[6] The record reveals that in a separate trial Appellant's co-conspirator, Louis Riggins, was convicted of murder in the first degree and criminal conspiracy and sentenced to life imprisonment. A third defendant, Alfred Clark, was acquitted of all charges in a separate trial.

> a motion to dismiss Appellant's PCRA petition on August 9, 2001.
>
> On November 19, 2001, the PCRA court provided Appellant and his counsel with notice of impending dismissal of the PCRA petition pursuant to Pa.R.Crim.P. 907. By order dated January 8, 2002, the PCRA court dismissed Appellant's PCRA petition without a hearing due to lack of merit.

Appellant filed a pro se notice of appeal on February 1, 2002.[7]

Commonwealth v. Diggs, No. 560 EDA 2002 at 1-4 (Pa.Super. filed 10/10/03) (unpublished memorandum).

"Our review of the denial of PCRA relief is limited to determining whether the record supports the findings of the PCRA court and whether these findings are free of legal error." Commonwealth v. Vanskiver, 819 A.2d 69, 72 (Pa.Super. 2003) (en banc). "To be eligible for relief under PCRA, a petitioner must plead and prove, inter alia, '[t]hat the allegation of error has not been previously litigated or waived.' 42 Pa.C.S.A. § 9543(a)(3)." Vanskiver, 819 A.2d at 72.

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7 As indicated previously, this Court affirmed the PCRA court's order on October 10, 2003; however, the Supreme Court granted Appellant's petition for allowance of appeal and remanded the matter to us.

73. An issue has been previously litigated if "(2) the highest appellate court in which the petitioner could have had review as a matter of right has ruled on the merits of the issue, or (3) it has been raised and decided in a proceeding collaterally attacking the conviction or sentence." 42 Pa.C.S.A. § 9544(a)(2), (3).

> An allegation is deemed waived if the petitioner could have raised it but failed to do soe before trial, at trial, during unitary review [or] on appeal.... A petitioner can avoid a finding of waiver under the PCRA by making an adequate and properly layered claim of ineffective assistance of counsel at his first available opportunity to do so.[8]

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[8] We recognize the Supreme Court's recent decision in Commonwealth v. Grant, 572 Pa. 48, 813 A.2d 726 (2002), which overruled a long line of cases indicating that trial counsel's ineffectiveness was required to be raised at the time when a petitioner obtained new counsel or those claims would be deemed waived. Grant, however, is inapplicable to this case. In discussing the retroactive application of the new rule announced in Grant, the Supreme Court indicated that the new rule "has no effect on cases currently pending on collateral review." Grant, 572 Pa. at 69 n.16, 813 A.2d at 739 n.16 (2002). At the time Grant was decided, the current case was pending on the collateral review as to the ineffective assistance of counsel claims.

Commonealth v. Rivera, 816 A.2d 282, 287 (Pa.Super. 2003) (quotations and quotation marks omitted).

With regard to claims of ineffective assistance of counsel:

> [C]ounsel is presumed to be effective and the burden of demonstrating ineffectiveness rests on appellant. To prevail on a claim of ineffectiveness, appellant must show that his underlying contentions possess arguable merit. Finding no merit, our inquiry would cease because counsel will not be deemed ineffective for failing to pursue a baseless or meritless claim. If appellant's contention is found to be of arguable merit, he must also establish that the course chosen by counsel had no reasonable basis designed to effectuate his client's interest. Finally, appellant must show how counsel's commission or omission prejudiced appellant.

Commonwealth v. Thomas, 783 A.2d 328, 332-333 (Pa.Super. 2001) (quotation omitted).

Appellant's first claim is that the trial court should have made on-the-record determination for the voluntariness of the Appellant's waiver of counsel at the post-trial motions hearing. Appellant asserts he did not voluntarily waive his right to counsel for the post-trial motions hearing. We find

this issue to be waived because Appellant could have raised the issue on direct appeal but failed to do so. Rivera, supra. However, this does not end our inquiry as Appellant contends appellate counsel was ineffective in failing to raise the issue of appeal.

Pa.R.Crim.P. 318[9] provides, in relevant part, that "[t]he defendant may waive the right to be represented by counsel," and "[w]hen the defendant seeks to waive the right to counsel... the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary, and intelligent waiver of counsel."[10]

Assuming, arguendo, there was a violation of Pa.R.Crim.P. 318 in that the post-trial motions hearing court did not hold an on-the-record colloquy to determine whether Appellant was voluntarily proceeding pro se, but with stand-by counsel, we conclude no relief is due. Case law establishes that "when a Rule 318 violation occurs, relief is warranted only if the appellant suffers actual prejudice as a result thereof." Commonwealth v. Davis, 573

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[9] We note that, effective April 1, 2001, Pa.R.Crim.P. 318 was renumbered Pa.R.Crim.P. 121.

[10] Appellant basis his argument on Commonwealth v. Grazier, 552 Pa. 9, 713 A.2d 81 (1998). However, Grazier applies when a waiver of counsel is sought at the post-conviction and appellate stages. See Commonwealth v. Powell, 787 A.2d 1017 (Pa.Super. 2001).

A.2d 1101, 1007, n.7 (Pa.Super. 1990) (citations omitted). Commonwealth v. Meehan, A.2d 1151 (Pa.Super. 1993).

Appellant's only assertion of prejudice is that if counsel was appointed counsel would have raise additional issues at the post-trial motions hearing, which would have avoided waiver of the issues. We find little merit to this issue in that stand-by counsel was present and could have raised any additional issues.[11] Davis, supra. Moreover, on direct appeal, while this Court noted that two of Appellant's issues were waived because the issues were not raised in Appellant's issues were waived because the issues were not raised in Appellant's post-trial motions, we addressed the issues and found them to be meritless. See Commonwealth v. Diggs, No. 3664 Philadelphia 1994 at 8-9 (Pa.Super. filed 8/15/96) (unpublished memorandum). In addition, in the present appeal, as well be discussed infra, we have not found any of

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[11] We note that Appellant does not argue that he would not have waived his right to counsel if more specific inquiry had been made under Pa.R.Crim.P. 318. See Meehan, supra. In fact, the thrust of Appellant's argument is that he was not satisfied with the appointment of stand-by counsel and would have preferred another attorney. "[T]he right to appointed counsel does not include the right to counsel of the defendant's choice." Commonwealth v. Albrecht, 554, Pa. 31, 63, 720 A.2d 693, 709 (1998) (citation omitted).

Appellant's issues to be waived because they were not raised in a post-trial motion or adequately developed at the post-trial motions hearing. Therefore, we find Appellant has failed to aver actual prejudice, and Appellant is not entitled to relief on his ineffective assistance of appellate counsel claim.

Appellant's second argument is that his double jeopardy rights were violated when he was tried four times for the same offense. H argues that mistrials were granted due to the prosecutor's improper striking of black jurors. This claim was raised by Appellant on direct appeal, and we found the claim to be meritless. Commonwealth v. Diggs, No. 3664 Philadelphia 1994 at 2-4 (Pa.Super. filed 8/15/96) (unpublished memorandum). Since the issue has been previously litigated, it is procedurally barred.[12] See

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12 In discussing his double jeopardy claim, Appellant argues that he has newly-discovered evidence relating to racial discrimination in the jury selection process. He argues that a videotape revealing Philadelphia assistant district attorney Jack McMahon's views on jury selection reveal a policy of racial discrimination in the district attorney's office. The Supreme Court has repeatedly analyzed this issue and has concluded that the mere existence of the tape does not demonstrate that there was prejudice in a particular case. Commonwealth v. Morris, 573 Pa. 157, 822 A.2d 684 (2003); Commonwealth v. Rollins, 558 Pa. 532, 738 A.2d 435 (1999). As in the cases cited supra, Appellant has made several bald assertions

Commonwealth v. Bond, 572 Pa. 588, 819 A.2d 33 (2002) (holding PCRA claims barred when they were previously litigated).

Appellant's third argument is that appellate counsel was ineffective in failing to raise on direct appeal the issue of whether trial counsel was ineffective in failing to object to the prosecutor's questioning of Ricardo Kelsey regarding Kelsey's negotiated please to unrelated murder charges. We conclude the underlying issue is meritless.

During direct-examination, Mr. Kelsey testified that he pled guilty to the murders of Leroy Jackson, Jr., and Denise Walters. N.T. 10/22/92 at 195.[13] Mr. Kelsey testified that he entered into a negotiated plea agreement whereby he would pleased guilty to the Jackson/Walters murders and testify that Appellant confessed to murdering Ms. DeBose, and, in exchange, the Commonwealth would recommend a lesser sentence for the Jackson/Walters murders. N.T. 10/22/91 at 196-204. Appellant argues that the prosecutor's questioning of Mr. Kelsey about Mr. Kelsey's guilty plea in the unrelated double-murders implicated Appellant in those crimes, and. Therefore, Mr. Kelsey should not have been permitted to

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without providing any argument as to how the policy affected the jury selection his particular case.

[13]The murders were unrelated to the murder of Ms. DeBose, for which Appellant was being tried.

testify about the Jackson/Walters murders or his negotiated guilty plea relating thereto.

We have reviewed Mr. Kelsey's testimony. Mr. Kelsey never testified that Appellant participated in the murders of Mr. Jackson and ms. Walters, and contrary to Appellant's argument, there is no indication that Mr. Kelsey's testimony created such an inference. The prosecutor questioned Mr. Kelsey about the Jackson/Walters murders in anticipation of the defense challenging Mr. Kelsey's credibility regarding Appellant's confession to the murder of Ms. DeBose. As it was proper for the prosecutor to question Mr. Kelsey about his negotiated guilty plea on unrelated charges, we conclude trial counsel was not ineffective in failing to object and appellate counsel was not ineffective in failing to raise the issue on direct appeal. See Commonwealth v. Strong, 563 Pa. 455, 761 A.2d 1167 (2000) (holding that any implication, promise, or understanding that government would extend leniency in exchange for a witness's testimony is relevant to witness's credibility); Commonwealth v. Thomas, 783 A.2d 328 (Pa.Super. 2001) (holding that when a prosecution witness may be biased in favor of the prosecution relating to outstanding charges, the bias must be made known to the jury).[14]

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[14] Appellant also argues that the commonwealth should not have question Detective Martin Devlin about whether he was aware of any of the facts surrounding the Jack-

Appellant's fourth claim is that the trial court erred in instructing the jury on criminal conspiracy and accomplice liability as it related to first-degree murder. Specifically, Appellant contends the trial court's charge did not adequately inform the jury that an accomplice must share the specific intent to kill with the active partner in order to be convicted of first-degree murder and the court improperly instructed the jury regarding conspiracy. This claim is waived because it could have been raised on direct appeal. Rivera, supra. However, this does not end our inquiry because, in order to overcome waiver, Appellant has raised a layered in effective assistance of counsel claim. We conclude the underlying claim is meritless, and, therefore, appellant's ineffective assistance of counsel claims must fail.

> When reviewing a challenge to a jury instruction, we must review the charge as a whole. An instruction will be upheld if it clearly, adequately and accurately reflects

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son/Walters murders before he spoke to Mr. Kelsey, and that prior counsel was ineffective with regard thereto. N.T. 10/22/01 at 187-188. Appellant did not include this issue in his court ordered Pa.R.A.P. 1925(b) statement, and the issue was not addressed by the PCRA court. As such, it is waived. Lord, supra. In any event, a review of the transcript reveals that trial counsel objected to the Commonwealth's questioning, and therefore Appellant's ineffective assistance of counsel claims are meritless.

> the law. The trial court may use its own form of expressing to explain difficult legal concepts to the jury, as long as the trial court's instruction accurately conveys the law.

Commonwealth v. Cox, ··· Pa. ···, 863 A.2d 536, 549 (2004) (quotations, citations, and citations marks omitted).

When instructing the jury on accomplice liability, the trial court explained, in relevant part:

> The Criminal Code provides, in relevant part: A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the offense.
>
> It also says that a person is an accomplice of another person in the commission of an offense if, with the intent of promoting or facilitating the commission of the crime, he aids or agrees or attempts to aid such other person in planning or committing it.
>
> To aid and abet in the commission of a crime, one must possess a shared intent to commit it.
>
> One is an aider and abettor if he has joined in the commission of a crime, if he was an active partner in the intent which

> was the crime's basic element. The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all.
>
> While this must often be shown by circumstantial evidence, the proof must be more than to support suspicion or conjecture. Mere presence at the scene of the crime and knowledge of its commission are not sufficient to prove that one has agreed or attempted to aid and abet or is actually aiding and abetting in the commission of a crime.
>
> If one has only a terrified onlooker, neither his presence at the homicide nor his failure to report it would make him an accomplice, an aider or abettor or a coconspirator.

N.T. 10/24/91 at 397-398.

Moreover, in response to the jury's request for clarification, the trial court stated, inter alia, the following regarding accomplice liability:

> A person is really accountable for the conduct of another person when he is an accomplice of such other person in the commission of the offense.

> To aid and abet in the commission of a crime, one must possess a shared intent to commit it. One is an aider and abettor in the commission of a crime, that is he has joined in the commission, if he was an active partner in the intent which was the crime's basic element.

N.T. 10/24/91 at 418-419.

Regarding the charge for murder in the first degree, the trial court instructed the jury, in relevant part, as follows:

> I shall now define murder in the first degree.
>
> A criminal homicide constitutes murder of the first degree when it is committed by an unintentional killing.
>
> As used in this statute, intentional killing means, among other things, any willful, deliberate and premeditated killing.
>
> A killing is willful and deliberate if the defendant consciously decided to kill the victim, and it is premeditated if the defendant possessed a fully-formed intent to kill at the time when he acted, even though there need not have been any appreciable amount of the time between the time when the defen-

dant first conceived the idea of killing and the time when he acted.

The designed to kill can be formulated in a fraction of a second.

In determining whether or not the defendant committed the kind of intentional killing required for the first degree murder, you should consider the testimony of the expert witnesses, as well as all other evidence which may shed light on what was going on in the defendant's mind at the time of the alleged killing.

If the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may infer from that the killing was intentional.

N.T. 10/24/91 at 391-392 (emphasis added).

Moreover, in response to the jury's request for clarifications, the trial court stated, inter alia, the following regarding first degree murder:

Now, a definition of murder in the first degree. A criminal homicide constituted murder in the first degree when it is committed by an intentional killing.

As used in this statute, intentional killing means any willful, deliberate and premeditated killing.

A killing is willful and deliberate if the defendant consciously decided to kill the victim and it is premeditated if the defendant possessed a fully-formed intent to kill at the time he acted, even though there need not have been any appreciable amount of time between the time when the defendant first conceived the idea of killing and the time when he acted.

The design to kill can be formulated in a fraction of a second. In determination whether o not the defendant committed the king f intentional killing required for the first degree murder, you should consider the testimony of the expert witnesses as well as all other evidence, which may shed light on what was going on in the defendant's mind at the time of the alleged killing.

If the defendant intentional used a deadly weapon on a vital part of the victim's body, you may infer from that, that the killing was intentional.

N.T. 10/24/91 at 414-415.

The aforementioned instructions, when reviewed in totality, clearly and accurately indicated to the jury that, to find Appellant guilty of murder in the first degree, it was necessary that they find Appellant possessed the requisite specific intent to kill.

The charge properly instructed the jury that they had to find that Appellant acted with the specific intent of promoting of facilitating the commission of a willful or deliberate killing. See Commonwealth v. Murphy, 577 Pa. 275 844 A.2d 1228 (2004) (explaining accomplice liability). As such, the instruction was not confusing and adequately informed the jury that an accomplice must also have the specific intent to kill with the active partner to be convicted of first-degree murder. See Cox, supra. Therefore, Appellant's ineffective assistance of counsel claims fail.[15]

With regard to the crime of conspiracy, Appellant contends the following passages from the trial court's instruction were improper:

> Where two or more join in the commission of an unjustified assault which results fa-

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[15] We note that, to the extent Appellant alleges the trial court erred in initially stating, "[a] criminal homicide constituted murder of the first degree when it is committed by an unintentional killing," we conclude that such error was harmless. The trial court subsequently, on numerous occasions, informed the jury that first-degree murder required an intentional killing, in particularly, when the jury asked for clarification, the trial court thoroughly instructed the jury regarded the mens rea for first-degree murder, indicating that it required an intentional killing. Therefore Appellant is entitled to no relief on his ineffective assistance of counsel claims.

> tally, all are guilty, regardless of which one inflicts the mortal wound.
>
> Where two or more combine to make an assault, and in carrying out such common purpose another is killed, the one who enters into the combination but does not personally commit the wrongful act is equally responsible for the homicide as the one who directly causes it.
>
> ***
>
> Conspiracy is not synonymous with aiding and abetting. Conspiracy requires an agreement to commit a crime, plus an overt act.
>
> ***
>
> Now, conspiracy is not synonymous with aiding and abetting. Conspiracy requires an agreement to commit a crime, plus an overt act.

N.T. 10/24/91 at 396-397, 418.

We conclude the challenge portions accurately conveyed the elements of conspiracy to the jury, and, therefore, Appellant's ineffective assistance of counsel claims fail. See Murphy, supra (explaining elements of conspiracy).

Appellant's fifth claim is that the trial court's instruction regarding dying declarations created a presumption that Ms. DeBose's dying declaration was true and the trial court improperly defined "reasonable doubt." We find this issue to be waived because Appellant could have raised the issue on direct appeal but he failed to do so. Rivera, supra. "Moreover, Appellant has waived this claim because he failed to raise the issue in his court-ordered Pa.R.A.P. 1925(b) statement. Lord, supra. However, this does not end our inquiry as Appellant has presented a layered ineffective assistance of counsel claim. We find Appellant's ineffective assistance of counsel claim to be waived because Appellant failed to raise the claim in his court-ordered Pa.R.A.P. 1925(b) statement.[16] Lord, supra.

Appellant's sixth claim is that appellate counsel was ineffective in failing to allege on direct appeal that trial counsel was ineffective in failing to ques-

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[16] We note that Appellant acknowledges in his brief that he failed to raise in his pro se court-ordered Pa.R.A.P. 1925(b) statement the issue concerning the trial court's dying declaration and reasonable doubt charges and counsels' alleged ineffectiveness with regard thereto. See Appellant's Brief at 52. Appellant alleges he decided to raise the issue on appeal after further "studious efforts" on his part. Appellant's Brief at 52. We conclude Appellant has advanced no legitimate reason for this Court to overlook waiver in this case.

tion Appellant about his alibi. Appellant alleges that he was in Harrisburg, Pennsylvania when Ms. DeBose was murdered, and trial counsel should have asked Appellant about his whereabouts when Appellant testified. We find no relief is due.

Defense counsel testified that Appellant told him that he was in Harrisburg, Pennsylvania and that various witnesses would verify this fact. N.T. 2/28/94 at 20-21.[17] However, defense counsel further testified that he was unable to locate any of the witnesses and could not find anyone who would verify that Appellant was in Harrisburg, Pennsylvania when Ms. DeBose was murdered. N.T. 2/28/94 at 21. Defense counsel indicated that he was concerned that if he specifically asked Appellant where he was when Ms. DeBose was murdered the Commonwealth would ask Appellant on cross-examination who he was with and why the witnesses were not testifying. N.T. 2/28/94 at 22. During trial, defense counsel specifically asked Appellant if he killed Ms. DeBose, to which Appellant replied negatively, and defense counsel elicited testimony from Appellant that Appellant called his wife from Harrisburg, Pennsylvania the morning after the murder. N.T. 10/23/91 at 340-341.

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[17] In his post-trial motion, Appellant alleged that defense counsel was ineffective in failing to question Appellant about his alibi, and defense counsel testified at a hearing, which was held on February 28, 1994.

Based on the aforementioned, we conclude defense counsel had a reasonable, strategic basis for not specifically asking Appellant if he was in Harrisburg, Pennsylvania when Ms. DeBose was murdered, and, therefore, Appellant's layered ineffective assistance of counsel claim fails. Thomas, supra (holding that ineffective assistance of counsel claim fails if counsel had reasonable basis for decision).

Appellant's seventh claim is that, following the filing of his post-trial motion, the trial court improperly failed to provide Appellant with transcripts from voir dire. This claim is waived because Appellant could have raised this issue on direct appeal but he failed to do so. Rivera, supra. Appellant attempts to overcome waiver by baldly asserting that appellate counsel should have raised on appeal trial counsel's ineffectiveness in assuring that the voir dire notes were transcribed.[18] Appellant asserts that "[i]f appellate counsel had read the docket entries and reviewed [the] pro se pet[i]tion's that were filed with the clerk in [the] lower court, he would have seen the probability that there might just be something to the appellant's motions and allegations. He missed the mark." Appellant's Brief at 56. Appellant's general assertion is insufficient to overcome the presumption that counsel is competent. See Commonwealth v. Speight, 578 Pa. 520, 854 A.2d 450, 461 (2004).

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[18] Appellant has developed no specific argument concerning trial counsel's stewardship.

Appellant's eighth claim is that the prosecutor improperly excluded young, African-American males from the jury in violation of Batson v. Kentucky, 476 U.S. 79 (1986). This claim is waived because Appellant could have raised the issue on direct appeal but he failed to do so. Rivera, supra. However, this does not end our inquiry as Appellant contends trial counsel was ineffective in failing to object to the prosecutor's use of peremptory challenges and appellate counsel should have raised this issue on appeal. We find that no relief is due.

> To establish a claim under Batson, the defendant must prove that: he is a member of a cognizable racial or ethnic group; the State exercised its peremptory challenges to remove members of such group from the venire; and other relevant circumstances raise an inference that the State used peremptory challenges to exclude venirepersons from the same racial or ethnic group.

Commonwealth v. Uderra, --- Pa. ---, 862 A.2d 74, 84 (2004) (citation omitted). When there is an allegation that trial counsel failed to make a Batson challenge during voir dire and, as a result, there was no inquiry by the trial court, the defendant "bears the burden in the first instance and throughout of establishing actual, purposeful discrimination." Uderra, --- Pa. at ---, 862 A.2d at 86 (citations omitted). That is, when there was no Batson inquiry in the trial court, "in order to succeed on an unpreserved claim of ra-

cial discrimination in jury selection, we agree with those jurisdictions that have held that a post-conviction petitioner may not rely on a prima facie case under Batson, but must prove actual, purposeful discrimination by a preponderance of the evidence..." Uderra, ---Pa. at ---, 862 A.2d at 87 (citation omitted).

Since the PCRA court did not hold a hearing, Appellant has not had the opportunity to establish actual, purposeful discrimination at the post-conviction stage. Therefore, we must determine whether Appellant's proffer, if believed, would establish actual, purposeful discrimination. Uderra, supra.

Appellant states the prosecutor excluded young, black males from the jury and that such a pattern was established in Appellant's prior trials. Aside from baldly asserting that the prosecutor excluded the young, black males for the same reasons established in Appellant's prior trials, Appellant has not developed this allegation further. We conclude such a proffer is insufficient under Uderra, and therefore, we find no relief is due on Appellant's ineffective assistance of counsel claims.

Appellant's ninth claim is that the trial court erred in excluding evidence of Alfred Clark's acquittal. We find this issue to be waived because Appellant could have raised the issue on direct appeal but he failed to do so. Rivera, supra. However, this does not end our inquiry as Appellant has raised a lay-

ered ineffective assistance of counsel claim. We conclude that no relief is due.

> [A] person accused of a crime may not introduce evidence of the acquittal of another person charged in connection with the same episode to create an impression before the jury that the defendant is equally innocent. [There is] only one narrow exception to this general rule-the defendant may introduce evidence of another person's acquittal where that person testifies for the defense and the acquittal is introduced for the limited purpose of removing the cloud of criminal charges over [the defense] witness, created by Commonwealth evidence....

Commonwealth v. Holloway, 559 Pa. 258, 266, 739 A.2d 1039, 1044 (1999) (quotation and quotation marks omitted).

Here, the exception is inapplicable because Appellant did not call Alfred Clark to testify.[19] Consequently, there was no "cloud of criminal charges" over Mr. Clark and no need to rehabilitate Mr. Clark's credibility by reference to his acquittal. Id. Instead, Appellant sought to use evidence of Mr. Clark's acquittal to bolster his own credibility, which

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[19] Appellant indicates in his brief that Mr. Clark was deceased when Appellant was retried in October of 1991.

case law does not permit.[20] Id. Therefore, Appellant's underlying claim lacks arguable merit, and his ineffective assistance of counsel claims must fail.

Appellant's tenth claim is that Appellant was denied his right to a fair trial because he was required to stand trial while wearing prison clothes. This issue is waived because Appellant could have raised the issue on direct appeal but he failed to do so. Rivera, supra. In order to overcome waiver, Appellant has raised a layered ineffective assistance of counsel claim. We conclude no relief is due.

During the hearing on Appellant's post-trial motion, Appellant testified that, until the third day of trial, he wore a white shirt, powder blue pants, and boots, all of which were prison-issued. N.T. 2/28/94 at 47-49. He further testified that defense counsel gave him a suit jacket to wear over the shirt. N.T. 2/28/94 at 48. The trial judge indicated that she could not tell that Appellant was wearing prison-issued clothing. N.T. 2/28/94 at 47.

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[20] Appellant acknowledges the general rule but argues we should find an exception because the "prosecutor introduced evidence that the murder was committed by all three men, including Alfred Clark." Appellant's Brief at 59. Aside from this unsupported assertion, Appellant has provided this Court with no evidence or citation to record to support his claim.

The Supreme Court as disapproved the trial court forcing a defendant, who was incarcerated prior to trial, to attend trial in identifiable prison clothing, See Commonwealth v. Johnson, 576 Pa. 23, 838 A.2d 663 (2003), and this Court has held that counsel's failure to object to the appearance of a defendant before the jury in prison garb is a serious omission. See Commonwealth v. Connolly, 689 A.2d 950 (Pa.Super. 1997). The Supreme Court has explained that the prohibition against forcing a defendant to stand trial in prison garb "is based primarily upon the impact the constant reminder of the accused's condition implicit in such distinctive, identifiable attire might have upon the jury." Johnson, 838 A.2d at 680-681 (citations omitted).

Here, Appellant has failed to offer proof that the jury was aware that Appellant was clothed, in part, in prison attire, and Appellant has failed to establish that the clothing was marked or identified as prison attire. Commonwealth v. Moore, 534 Pa. 527, 633 A.2fd 1119 (1993). In fact, the trial judge indicated that she could not tell that Appellant was wearing prison-issued shirt, pants, and boots. As such, we find there is no arguable merit to Appellant's claim.

In any event, assuming, arguendo, that there is arguable merit to Appellant's claim, we conclude that the evidence against Appellant was overwhelming and there is no reasonable probability that but for Appellant's appearance the outcome of his case would have been different. See Connolly, supra.

Therefore, we conclude that Appellant has failed to establish the prejudice prong, and counsel cannot be found ineffective on this basis. Id.

Appellant's eleventh claim is that trial counsel was ineffective in failing to object to Appellant's illegal sentence and appellate counsel should have raised the claim on appeal.

With regard to the underlying claim, Appellant argues that, after his 1977 conviction, Judge Edwin Malmed sentenced Appellant to life in prison, to run concurrently a life sentence Appellant was serving regarding an unrelated murder. Following his retrial and 1991 conviction, Judge Juanita Kidd Stout also sentenced Appellant to life in prison; however, Judge Scott made the sentence consecutive to the life in prison sentence Appellant was serving for the unrelated murder. Relying on North Carolina v. Pearce,395 U.S. 711 (1969), Appellant argues the trial court was not permitted to impose a consecutive sentence unless the trial court had new information justifying the harsher sentence, and, therefore, his sentence was a product of illegal vindictiveness. We find no arguable merit.

> In North Caroline v. Pearce, Supra, the Court placed a limitation on the power of a sentencing authority to increase a sentence after reconviction following a new trial. It held that the Due Process Clause of the Fourteenth Amendment prevents [an] in-

> creased sentence when that increase was motivated by vindictiveness on the part of the sentencing judge...Beyond doubt, vindictiveness of a sentencing judge is the evil the Court sought to prevent rather than simply enlarge sentences after a new trial. The Pearce requirements thus do not apply in every case where a convicted defendant receives a high sentence on retrial.

Commonwealth v. Mikesell, 537 A.2d 1372, 1380 (Pa.Super. 1988) (quotation omitted). In Mikesell, this Court held that no presumption of vindictiveness applies when the judge who imposed the original sentence is different than the judge who imposed the new sentence following a successful appeal. See Commonwealth v. Maly, 558 A.2d 877 (Pa.Super. 1989). We further held that "[i]n the absence of a presumption, 'the defendant must affirmatively prove actual vindictiveness.'" Mikesell, 537 A.2d at 1381 (quotation omitted). Appellant has not set forth a case of actual vindictiveness, and, therefore, we find no merit to his layered ineffective assistance of counsel claim.

Appellant's final claim is that the PCRA court erred in failing to rant a hearing regarding affidavits Appellant submitted from fellow inmates. Appellant alleges his fellow inmates indicated that Mr. Kelsey told them that he life about Appellant's involvement in the murders in response to pressure placed on him by the police.

Appellant has failed to identify which fellow inmates to which he is referring and has otherwise failed to develop this claim.[21] Therefore, we decline to address the issue further. Pa.R.A.P. 2119.

For all of the foregoing reasons, we affirm.

Affirmed.

Judgment Entered,

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Prothonotary

Date:_____

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[21] We note that, to the extent Appellant is referring to affidavits from mr. Giles and Mr. VanHook, this Court has addressed affidavits which were submitted to us when we initially reviewed Appellant's appeal from the denial of PCRA relief. We found the issue to be meritless. Commonwealth v. Diggs, No. 570 EDA 2002 (Pa. Super. filed 10/10/03) (unpublished memorandum). We note that the Supreme Court did not overrule or remand concerning our resolution of this issue.

APPENDIX D- REPORT AND RECOMMENDATION, FILED MARCH 28, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES KIRK DIGGS	:	CIVIL ACTION
	:	
v.	:	No. 06-cv-0024
DAVID DIGUGLIELMO, et al.		

REPORT AND RECOMMENDATION

PETER B. SCUDERI March 28, 2007
UNITED STATES MAGISTRATE JUDGE

This is a counseled petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by Charles Kirk Diggs ("Petitioner"), an individual currently incarcerated in the State Correctional Institute at Graterford, Pennsylvania. For the reasons that follow, I recommend that the petition be denied.

I. FACTS AND PROCEDURAL HISTORY

The state court summarized the facts of this case as follows:

> On February 12, 1974, eighteen- [18-] year old Linda DeBose was brutally stabbed to death in the basement of her home on Medary Avenue in Philadelphia. When Linda's mother, Alice DeBose, returned from work at approximately 11:20 p.m. on the evening of February 12th, she found her daughter lying in a pool of blood. She immediately called the police who arrived shortly thereafter. [1] Linda DeBose was rushed to Albert Einstein Medical Center where she later died. Prior to her death, however, Linda DeBose was able to identify her attackers by name to both her mother and the police.
>
> Within three [3] hours of the murder, the Philadelphia police arrested [Petitioner's] co-conspirator, Louis Riggins. [Petitioner] was arrested [in June 1974] in Chester, Pennsylvania, where he had been hiding under several assumed names. Subsequent

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[1] Trial testimony revealed that Linda DeBose was stabbed approximately sixty-nine (69) times in the throat, arms, and upper body, and that she was left to die.

> to his arrest, [Petitioner] was released on bail but again fled and eluded authorities for an additional two [2] years. He was arrested again in Philadelphia on May 17, 1976.

Commonwealth v. Diggs, No. 570 EDA 2002, at 2 (Pa. Super. April 19, 2005) (footnote in original).

On November 3, 1977, a jury sitting before the Honorable Edwin Malmed, Court of Common Pleas of Philadelphia County, found Petitioner guilty of first-degree murder, criminal conspiracy, possession of an instrument of crime, and prohibited weapons.[2] Judge Malmed subsequently sentenced Petitioner to life imprisonment, concurrent to any other sentences he may be serving.

In 1990, after pursuing his appellate rights under Pennsylvania law, Petitioner filed a federal writ of

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[2] The 1977 conviction came at the end of Petitioner's third trial. His first trial ended when he requested the opportunity to obtain new counsel, and his second trial ended in mistrial when members of the jury were exposed to newspaper coverage of the case. Meanwhile, Petitioner's co-conspirator, Louis Riggins, was convicted of first-degree murder and criminal conspiracy in a separate trial, and sentenced to life imprisonment. A third defendant, Alfred Clark, was acquitted of all charges in a separate trial

habeas corpus in the Eastern District of Pennsylvania. On March 27, 1991, the Honorable John P. Fullam granted federal habeas corpus relief on the grounds that in Petitioner's 1977 jury trial, the prosecution had systematically excluded black venire persons by challenging them solely on the basis of race. Diggs v. Vaughn, 1991 WL 46319 (E.D. Pa. March 27, 1991) (unpublished). The District Court ordered a new trial pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), a case decided while Petitioner's appeal had been pending in the state courts.

In October 1991, Petitioner was re-tried by a jury sitting before the Honorable Juanita Kidd Stout, Court of Common Pleas of Philadelphia County. On October 25, 1991, Petitioner was again convicted of first-degree murder, criminal conspiracy, possession of an instrument of crime, and prohibited weapons. Judge Stout subsequently sentenced Petitioner to life imprisonment for the murder conviction, consecutive to any other sentences he was then serving.[3]

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[3] At the time Judge Stout sentenced Petitioner to life imprisonment for the 1974 murder of Linda DeBose after his fourth (4th) trial, Petitioner was already serving life imprisonment for an unrelated kidnapping and murder committed in Harrisburg, Pennsylvania, in 1975, as well as other federal prison sentences for bank robberies in Pennsylvania and New Jersey.

Petitioner filed a direct appeal with the Pennsylvania Superior Court, raising the following claims:

1. Violation of double jeopardy rights in being re-tried for the same offense;

2. Prosecutorial misconduct regarding the late disclosure of Commonwealth witness Ricardo Kelsey, trial court error in allowing his testimony, and ineffectiveness of trial counsel for failing to object to the prosecutor's questioning of Kelsey regarding his negotiated plea to unrelated murder charges;

3. Ineffectiveness of trial counsel for failing to object to the following statements made by the prosecutor:

    a. That if the basement floor and walls could talk, they would say Petitioner was responsible for the victim's death;

    b. That Petitioner is a liar, thereby giving his personal opinion of Petitioner's veracity;

c. That Petitioner is a "vampire;"

d. That the jury should find Petitioner guilty so that the victim's soul could rest in peace; and

e. That Petitioner was a "beast," "inhumane," and "heartless," and that the killing was equal to "animal abuse" and "war crimes;" and

4. Ineffectiveness of trial counsel for failing to impeach Kelsey with a statement Kelsey gave to the police.

Commonwealth v. Diggs, 3664 PHILA 1994, at 1-9 (Pa. Super. Aug. 15, 1996). On August 15, 1996, the Superior Court affirmed the judgments of sentence in a memorandum opinion. Id. at 9. Petitioner filed a petition for allowance of appeal in the Pennsylvania Supreme Court, which was denied on July 14, 1997. Commonwealth v. Diggs, 698 A.2d 592 (Pa. 1997) (table). Petitioner also filed a petition for writ of certiorari with the United States Supreme Court, which was denied on February 23, 1998. Diggs v. Pennsylvania, 522 U.S. 1124 (1998) (table).

On January 19, 1999, Petitioner filed a pro se petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat. § 9541, et seq. The

PCRA court appointed counsel and two (2) amended PCRA petitions were subsequently filed – on October 10, 2000, and April 10, 2001, respectively. By Order dated January 8, 2002, the PCRA court dismissed the PCRA petition without a hearing. Petitioner filed a pro se notice of appeal with the Pennsylvania Superior Court. On October 10, 2003, the Superior Court affirmed the dismissal of his PCRA petition, finding that Petitioner waived all but one (1) of the issues due to his failure to properly file a statement of matters complained of on appeal in accordance with Pennsylvania's rules of appellate procedure. Commonwealth v. Diggs, 570 EDA 2002 (Pa. Super. Oct. 10, 2003). Petitioner subsequently filed a motion for reconsideration, which was denied, and a petition for allowance of appeal in the Pennsylvania Supreme Court. On September 16, 2004, the Pennsylvania Supreme Court remanded the case to the Superior Court and instructed the Superior Court to address the merits of the claims Petitioner raised in his PCRA appeal. The Superior Court then addressed the following twelve (12) claims:

1. Trial court error for not making an on-the-record determination of the voluntariness of Petitioner's waiver of counsel at the post-trial motions hearing, and ineffectiveness of appellate counsel for not raising the issue on appeal;

2. Violation of double jeopardy rights in having four (4) trials for the same offense;

3. Ineffectiveness of appellate counsel for failing to raise on direct appeal the issue of whether trial counsel was ineffective in failing to object to the prosecutor's questioning of Ricardo Kelsey regarding Kelsey's negotiated plea to unrelated murder charges;

4. Trial court error in instructing the jury on criminal conspiracy and accomplice liability as it related to first-degree murder, and layered ineffectiveness of counsel for failing to object or raise the claim on appeal;

5. Trial court error in instructing the jury on dying declarations;

6. Ineffectiveness of appellate counsel for failing to raise on direct appeal the issue of whether trial counsel was ineffective for failing to question Petitioner about his alibi;

7. Trial court error in failing to provide Petitioner with transcripts from voir dire;

8. Prosecutorial misconduct in improperly excluding black venire persons in violation of Batson, and layered ineffectiveness of counsel for failing to object or raise the claim on appeal;

9. Trial court error in excluding evidence of Alfred Clark's acquittal in a separate trial, and layered ineffectiveness of counsel for failing to object or raise this claim on claim;

10. Violation of due process because Petitioner was required to stand trial while wearing prison clothes, and layered ineffectiveness of counsel for failing to object or raise the claim on appeal;

11. Layered ineffectiveness of counsel for failing to object to Petitioner's sentence, and failing to raise the claim on appeal; and

12. PCRA court error in failing to grant an evidentiary hearing on affidavits Petitioner submitted from fellow inmates regarding testimony by Ricardo Kelsey.

Commonwealth v. Diggs, 570 EDA 2002, at 5-23 (Pa. Super. April 19, 2005). On April 19, 2005, the Penn-

sylvania Superior Court affirmed the denial of PCRA relief in a memorandum opinion. Id. at 24. Petitioner again sought review by the Pennsylvania Supreme Court, which denied the request for allowance of appeal by Order dated December 13, 2005. Commonwealth v. Diggs, 890 A.2d 1056 (Pa. 2005) (table).

On January 4, 2006, Petitioner filed the present counseled petition for writ of habeas corpus. Counsel requested, and the Court granted, two (2) extensions of time to file a brief in support of the petition. On October 10, 2006, Petitioner filed a 139-page "Amended Petition . . . and Amended Brief," raising the following claims:[4]

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[4] Petitioner's claims have been re-worded and re-numbered for purposes of discussion. This reorganization is necessitated by the fact that the numerous claims and sub-claims presented in Petitioner's brief are difficult to ascertain, not all of the claims asserted are fully developed, and those that are developed are frequently done so in a manner that confounds, rather than informs, the reader. As a result, the Court embraces the approach taken by Respondents, namely, to address the developed parts of Petitioner's claims "in a manner that is streamlined but that fairly meets their substance." See Answer at 10

1. Denial of right to effective assistance of counsel when the state court failed to colloquy him about his wish to be represented by effective counsel on post-verdict motions and after the denial of his PCRA petition, and layered ineffectiveness of counsel in this regard;

2. Trial court error in instructing the jury that impending death provides the assurance of truthfulness, and layered ineffectiveness of counsel for failing to raise and preserve this claim;

3. Ineffectiveness of appellate counsel for failing to raise ineffectiveness of trial counsel for not objecting to the prosecutor's questioning of a prosecution witness regarding the witness's past criminal history;

4. Trial court error in instructing the jury on accomplice liability, conspiracy, and specific intent, and ineffectiveness of appellate counsel for failing to raise ineffectiveness of trial counsel for not challenging these jury instructions;

5. Violation of double jeopardy rights in having four (4) trials for the same offense;

6. Ineffectiveness of trial counsel for failing to present Petitioner's alibi defense, and ineffectiveness of appellate counsel for failing to preserve the claim on appeal;

7. Trial court error in failing to provide Petitioner with the trial transcripts from voir dire;

8. Prosecutorial misconduct in improperly excluding black venire persons in violation of Batson;

9. Violation of due process by excluding evidence of the acquittal of Petitioner's co-defendant, Alfred Clark, and layered ineffectiveness of counsel for failing to raise and preserve this claim;

10. Violation of due process for having to wear prison clothes at trial;

11. Trial court error in increasing his sentence after trial, and layered ineffectiveness of counsel for failing to raise and preserve this claim;

12. Trial court error for failing to grant an evidentiary hearing on affidavits submitted by witnesses attacking the credibility of Ricardo Kelsey; and

13. Prosecutorial misconduct in closing argument.

See Ptr.'s Br. at 9-139.

Given the length and convoluted nature of Petitioner's brief, and the number of claims raised therein, Respondents requested, and were granted, an extension of time to file their Response. On March 5, 2007, Respondents filed a Response arguing that the majority of Petitioner's claims are procedurally defaulted, and that all of the claims are meritless.

II. APPLICABLE LAW

A. Exhaustion and Procedural Default

A federal court, absent unusual circumstances, should not entertain a petition for writ of habeas corpus unless the petitioner has first satisfied the exhaustion requirement of 28 U.S.C. § 2254. See 28 U.S.C. § 2254(b). Under § 2254(c), a petitioner will not be deemed to have exhausted available state remedies if he had the right under the law of the state to raise, by any available procedure, the question presented. O'Sullivan v. Boerckel, 526 U.S. 838

(1999) ("we ask not only whether a prisoner has exhausted his state remedies, but also whether he has properly exhausted those remedies, i.e., whether he has fairly presented his claims to the state courts"); see also Picard v. Connor, 404 U.S. 270 (1971). "The exhaustion requirement ensures that state courts have the first opportunity to review convictions and preserves the role of state courts in protecting federally guaranteed rights." Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000) (quoting Caswell v. Ryan, 953 F.2d 853, 856 (3d Cir. 1992)). The habeas corpus petitioner has the burden of proving exhaustion of all available state remedies. Lambert v. Blackwell, 134 F.3d 506, 513 (3d Cir. 1997) (citing 28 U.S.C.A. § 2254).

Although exhaustion may be excused, I may nonetheless be precluded from reviewing the merits of claims deemed exhausted. As the Third Circuit has held:

> claims deemed exhausted because of a state procedural bar are procedurally defaulted, and federal courts may not consider their merits unless the petitioner "establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default."

Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000); see also Coleman v. Thompson, 501 U.S. 722, 731 (1991). The "cause and prejudice" standard applies whether the default in question occurred at trial, on

appeal, or on state collateral attack. Edwards v. Carpenter, 529 U.S. 446, 451 (2000).

The Supreme Court has delineated what constitutes "cause" for the procedural default: the petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Werts, 228 F.3d at 192-93. With regard to the prejudice requirement, the habeas petitioner must prove "'not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.'" Id. at 193. This standard essentially requires the petitioner to show he was denied "fundamental fairness" at trial. Id.

In the alternative, if the petitioner fails to demonstrate cause and prejudice for the default, the federal court may also consider a defaulted claim if the petitioner can demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 748. In order to satisfy the fundamental miscarriage of justice exception, the Supreme Court requires that the petitioner show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Schlup v. Delo, 513 U.S. 298, 327 (1995). To satisfy the "actual innocence" standard, a petitioner must show that, in light of new evidence, it is more likely than not that no reasonable juror would have found

him guilty beyond a reasonable doubt. Schlup, 513 U.S. at 327.

B. Standard of Review for Claims Addressed on the Merits

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254. Werts, 228 F.3d at 195. The AEDPA increases the deference federal courts must give to the factual findings and legal determinations of the state courts. Id. at 196 (citing Dickerson v. Vaughn, 90 F.3d 87, 90 (3d Cir. 1996)). Pursuant to 28 U.S.C. § 2254(d), as amended by the AEDPA, a petition for habeas corpus may only be granted if (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States;" or if (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. Werts, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court expounded upon this language in Williams v. Taylor, 529 U.S. 362 (2000). In Williams, the Court explained that "[u]nder the 'contrary to clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." 529 U.S. at 412-413. The Court in Williams further stated that "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The "unreasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. "In further delineating the 'unreasonable application of' component, the Supreme Court stressed that an unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 411).

III. DISCUSSION

A.. Denial of Right to Effective Assistance of Counsel When the State Court Failed to Colloquy Petitioner About His Wish to be Represented by Counsel, and Layered Ineffectiveness of Counsel in this Regard

Petitioner first argues that the state courts violated his due process and equal protection rights by failing to colloquy him about his wish to be represented by counsel on post-verdict motions and after the denial of his PCRA petition, thereby denying his right to effective assistance of counsel. Petitioner also raises a layered claim of ineffectiveness of counsel for failing to raise and preserve this denial-of-counsel. See Pet.'s Br. at 9-29. Respondents counter that the various aspects of this claim are either procedurally defaulted or meritless. See Answer at 12-23.

In addressing this claim on collateral appeal, the Pennsylvania Superior Court stated the following:

> [Petitioner's] first claim is that the trial court should have made an on the record determination of the voluntariness of [Petitioner's] waiver of counsel at the post-trial motions hearing. [Petitioner] asserts he did not voluntarily waive his right to counsel for the post-trial motions hearing. We find this issue to be waived because [Petitioner] could

have raised the issue on direct appeal but failed to do so. However, this does not end our inquiry as [Petitioner] contends appellate counsel was ineffective for failing to raise the issue on appeal.

[Pennsylvania Rule of Criminal Procedure] 318 provides, in relevant part, "[t]he defendant may waive the right to be represented by counsel," and "[w]hen the defendant seeks to waive the right to counsel . . . the judge shall ascertain from the defendant, on the record, whether this is a knowing, voluntary, and intelligent waiver of counsel."

Assuming, arguendo, there was a violation of Pa.R.Crim.P. 318 in that the post-trial motions hearing court did not hold an on-the-record colloquy to determine whether [Petitioner] was voluntarily proceeding pro se, but with stand-by counsel, we conclude no relief is due. Case law establishes that "when a Rule 318 violation occurs, relief is warranted only if the appellant suffers actual prejudice as a result thereof." Commonwealth v. Davis, 573 A.2d 1101, 1107 n.7 (Pa. Super. 1990). . . .

[Petitioner's] only assertion of prejudice is that if counsel was appointed, counsel would have raised additional issues at the post-trial motions hearing, which would have

> avoided waiver of the issues. We find little merit to this issue in that stand-by counsel was present and could have raised any additional issues. Moreover, on direct appeal, while this Court notes that two [2] of [Petitioner's] issues were waived because the issues were not raised in [Petitioner's] post-trial motions, we addressed the issues and found them to be meritless. In addition, . . . we have not found any of [Petitioner's] issues to be waived because they were not raised in a post-trial motion or adequately developed at the post-trial motions hearing. Therefore, we find [Petitioner] has failed to aver actual prejudice, and [Petitioner] is not entitled to relief on his ineffectiveness assistance of appellate counsel claim.

Commonwealth v. Diggs, 570 EDA 2002, at 5-7 (Pa. Super. April 19, 2005) (footnote and citations to state law omitted). In a footnote, the Superior Court added the following:

> We note that [Petitioner] does not argue that he would not have waived his right to counsel if more specific inquiry had been made under Pa.R.Crim.P. 318. In fact, the thrust of [Petitioner's] argument is that he was not satisfied with the appointment of stand-by counsel and would have preferred another attorney. "[T]he right to appointed counsel does not include the right to counsel

> of the defendant's choice." Commonwealth v. Albrecht, 720 A.2d 693, 709 (Pa. 1998).

Commonwealth v. Diggs, 570 EDA 2002, at 7, n.11 (Pa. Super. April 19, 2005).

In sum, therefore, the state court found: (1) Petitioner waived his claim of trial court error for failing to make an on-the-record determination of the voluntariness of his waiver of counsel at the post-trial motions hearing; and (2) his claim of ineffective assistance of appellate counsel for failing to raise the issue on appeal was without merit.

1. Trial Court Error – Procedurally Defaulted

Respondents first argue that the trial court error portion of this claim is procedurally defaulted. I agree. Federal courts will not review a state court decision involving a question of federal law if the state court decision is based on state law, even a state procedural law, that is independent of the federal question and adequate to support the judgment. Coleman v. Thompson, 501 U.S. 722, 727-731 (1991). As the Supreme Court has explained, the application of the independent and adequate state ground doctrine is grounded in concerns of comity and federalism:

> In the absence of the independent and adequate state ground doctrine in federal habeas, habeas petitioners would be able to avoid the exhaustion requirement by de

> faulting their federal claims in state court. The independent and adequate state ground doctrine ensures that the States' interest in correcting their own mistakes is respected in all federal habeas cases.

Edwards, 529 U.S. at 452-453 (citing Coleman, 501 U.S. at 732). The independent and adequate state ground doctrine is entitled to federal deference where a state court finds procedural non-compliance, but also proceeds to discuss the merits of a claim. Carey v. Scaffold, 536 U.S. 214 (2002).

Here, the Pennsylvania Superior Court determined that the trial court error aspect of this claim had been waived because Petitioner "could have raised the issue on direct appeal but failed to do so." [5] Commonwealth v. Diggs, 570 EDA 2002, at 5 (Pa. Super. April 19, 2005). Because the requirement that claims of trial error be raised on direct appeal is "firmly established and regularly followed," the independent and adequate state law doctrine applies. See, e.g., Riley v. Lavan, 2005 WL 1995462 (E.D. Pa. Aug. 16, 2005) (quoting Bronshstein v. Horn, 404

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[5] Importantly, the state court did not find the issue waived because Petitioner omitted the issue from a pro se statement of matters complained on appeal, or any other document filed while proceeding pro se. Rather, Petitioner was represented by counsel on direct appeal.

F.3d 700, 707 (3d Cir. 2005)). As a result, this claim is unexhausted for purposes of federal habeas review. I find, however, that exhaustion should be excused pursuant to 28 U.S.C. § 2254(b)(1), because as the procedural history of this case makes clear, a return to state court would be futile due to "an absence of available State corrective process." Lines, 208 F.3d at 159. Although I recommend that exhaustion be excused, Petitioner is considered to have procedurally defaulted this claim because state procedural rules bar him from seeking further relief in the state courts. Keller v. Larkins, 251 F.3d 408, 415 (3d Cir. 2001). As a result, I may not consider the merits of this claim unless Petitioner establishes "cause and prejudice" to excuse his default. Id. (citing Coleman, 501 U.S. at 750).

Ineffective assistance of counsel can constitute "cause" for procedural default only if the claim was presented to the state courts independently and prior to its use to establish cause. See Edwards, 529 U.S. at 451. "Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. In other words, ineffective assistance adequate to establish cause for the procedural default of some other constitutional claim is itself an independent constitutional claim." Id. (emphasis in original). Here, Petitioner, on collateral appeal, asserted a claim of ineffective assistance of appellate counsel for failing to preserve this claim on direct appeal.

However, as discussed infra, the underlying ineffectiveness of appellate counsel claim has no merit. Therefore, I find that Petitioner has not established cause and prejudice to excuse the default of this claim. See Edwards, 529 U.S. at 451.

In sum, I find that this aspect of Petitioner's first claim – namely, that the state courts violated his due process and equal protection rights by failing to colloquy him about his wish to be represented by counsel on post-verdict motions – is procedurally defaulted by operation of the independent and adequate state ground doctrine, and that Petitioner has not shown cause for the default or actual prejudice resulting therefrom, nor has he made a showing of "actual innocence." See Schlup v. Delo, 513 U.S. 298 326-327 (1995). Therefore, this portion of Petitioner's first claim is dismissed.[6]

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[6] Petitioner raises s another variant of this claim, namely, that the state courts, following the denial of his PCRA petition, improperly failed to determine whether his decision to proceed without counsel was "knowing" or "intelligent," thereby denying him access to counsel during his collateral appeal. This claim is clearly defaulted because it was never presented to the state courts, nor is there time for Petitioner to properly do so. In any event, this variant of the claim is without merit because there is no federal constitutional right to the assistance of counsel on collateral appeal. See 28 U.S.C. § 2254(i); Pennsylvania v.

2. Ineffective Assistance of Counsel – Merits

Petitioner also asserts a layered claim of ineffectiveness of counsel for failing to raise and preserve the aforementioned denial-of-counsel claim. Claims of ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the United States Supreme Court set forth the standard for a petitioner seeking habeas relief on the grounds of ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687. Because "it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission

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Finley, 481 U.S. 551, 556-557 (1987); Cristin v. Brennan, 281 F.3d 404, 420 (3d Cir. 2002).

of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within the wide range ofreasonable professional assistance." Id. at 689. In determining prejudice, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." Id. at 695.

Moreover, the Strickland test also applies to claims of ineffective assistance of appellate counsel. Petitioner is first required to show that appellate counsel's actions fell outside "the wide range of reasonable professional assistance; that is, [Petitioner would have to] overcome the presumption that, under the circumstances, the challenged action 'might be considered sound [appellate] strategy.'" Buehl v. Vaughn, 166 F.3d 163, 173 (3d Cir. 1999) (citing Strickland, 466 U.S. at 689).

As previously explained, the Pennsylvania Superior Court denied this ineffectiveness claim on the grounds that Petitioner failed to show how he was prejudiced by appellate counsel's failure to raise and preserve the denial-of-counsel claim on direct appeal. I agree with the determination of the state court. At his post-verdict motion hearing, Judge Stout appointed an attorney to represent Petitioner, but Petitioner stated that he was unhappy with the

appointment and proceeded to represent himself.[7] At the conclusion of the hearing – during which Petitioner presented oral argument and conducted the direct and re-direct examination of his trial attorney – Judge Stout asked whether Petitioner had any remaining arguments, to which he responded, "I think I hit it all, Justice Stout. Thank you very much." (N.T. 2/28/94, at 51). Petitioner did not argue or suggest at any point during the hearing that he wished to be represented by counsel, nor is there any indication that he wished to raise additional claims.

Petitioner argues that the absence of a colloquy about the potential risks of proceeding pro se cost him "important rights and advantages." See Ptr.'s Br. at 11. However, Petitioner does not explain what these rights and advantages may have been; he does not explain what Judge Stout should have told him that he – given his extensive trial and appellate experience – did not already know; and he presents no evidence indicating that he would have declined to proceed pro se if the court had given the colloquy. In any event, Petitioner appears to argue that if counsel had been appointed (that is, counsel acceptable to Petitioner), counsel would have raised additional is

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[7] Court-appointed counsel remained present and served as stand-in counsel during the post-verdict motion hearing.

sues during or after the post-trial motions hearing, thus preventing any issues from being waived. Several facts undermine Petitioner's position. First, contrary to Petitioner's assertion, the Supreme Court has not recognized a right to appointed counsel of choice, but rather only to retained counsel of choice. See United States v. Gonzalez-Lopez, — U.S. — , 126 S. Ct. 2457 (2006). Second, stand-in counsel was present during the post-trial motion hearing and could have asserted any meritorious claims.[8] Third and most importantly, as explained by the Superior Court, Petitioner was ultimately held not to have waived any issues as a result of not raising or developing them while pursuing his post-trial motions pro se.

For all of the aforementioned reasons, I find that Petitioner was not prejudiced by appellate counsel's failure to raise and preserve a claim that the trial court improperly denied Petitioner his right to counsel at the post-verdict hearing. Therefore, I conclude that Petitioner is not entitled to relief on this claim.[9]

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[8] To the extent Petitioner alleges ineffectiveness of stand-in counsel for failing to raise this denial-of-counsel claim at the post-trial hearing, I find the claim to be unexhausted and procedurally defaulted for the reasons previously stated.

[9] As previously stated, in order for Petitioner to prevail on a claim of ineffective assistance of counsel he must show

B. Trial Court Error in Instructing the Jury that Impending Death Provides the Assurance of Truthfulness, and Layered Ineffectiveness of Counsel for Failing to Raise and Preserve This Claim

Petitioner next argues that the trial court violated his constitutional rights by erroneously instructing the jury that impending death provides the assurance of truthfulness; that trial counsel was ineffective in this regard; and that appellate counsel was ineffective for failing to preserve the claim on appeal. See Pet.'s Br. at 29-37. Respondents counter that this claim is procedurally defaulted and meritless. See Answer at 23-27.

As explained by the Pennsylvania Superior Court on collateral appeal, Petitioner waived the claim of trial court error by failing to raise the claim on direct appeal, and waived the ineffective assistance of counsel claim by failing to raise the issue in the statement of issues raised on appeal, which Petitioner had been ordered to file. Commonwealth v. Diggs,

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both constitutionally deficient representation on the part of counsel and resulting prejudice. Strickland, 466 U.S. at 687. As a result, "there is no reason for a court deciding an ineffectiveness assistance claim to . . . . address both components of the inquiry if the defendant makes an insufficient showing on one." Id. at 687.

570 EDA 2002, at 15 (Pa. Super. April 19, 2005). As a result, I conclude that both the trial court error and ineffectiveness prongs of this claim are procedurally defaulted. Furthermore, counsel's alleged ineffectiveness cannot constitute "cause" for the default because, as previously explained, Petitioner failed to properly present the claim to the state courts independently and prior to its use to establish cause.[10] See Edwards, 529 U.S. at 451. Therefore, I find that Petitioner has not shown cause for the default or actual prejudice resulting therefrom, nor has he made a showing of "actual innocence." See Schlup, supra. Because I find that both aspects of this claim are procedurally defaulted, federal review is barred.[11]

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[10] Furthermore, any claim that Petitioner would make regarding ineffectiveness of post conviction counsel as cause for his failure to present this claim, or any other claim, in his petitions for post-conviction relief also must fail. The Supreme Court has determined that any attorney error that has led to the default of a petitioner's claims on collateral appeal cannot constitute cause to excuse his default in a federal habeas petition. See Coleman, 501 U.S. at 757; see also Pennsylvania v. Finley, 481 U.S. 551, 558 (1987) (Constitution does not dictate standard for attorney effectiveness on collateral appeal).

[11] Even were I to reach the merits of this claim, I would find the claim to be meritless. An erroneous jury instruction can rise to the level of a constitutional violation if it

"so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 72 (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). Jury instructions must be read as a whole and in context. Estelle, 502 U.S. at 72. Here, Judge Stout instructed the jury that "[y]ou may consider this statement of the deceased in determining whether Petitioner was one of the killers," and that "[t]he credibility, interpretation and weight to be given a dying declaration under the attending circumstances of the case are matters exclusively for you" to decide. (N.T. 10/24/91, at 407). In other words, Judge Stout correctly informed the jury that it could find that awareness of impending death was a reason to think the victim's dying declaration was truthful, but that it was not required to find the declaration to be truthful. Because the instructions accurately set forth the law on dying declarations, there can be no constitutional error on this basis – and it follows, therefore, that counsel cannot be said to have acted deficiently in failing to raise or preserve this claim. Therefore, Petitioner would not be entitled to relief on this claim.

C. Ineffectiveness of Appellate Counsel for Failing to Raise Ineffectiveness of Trial Counsel for Not Objecting to Prosecutor's Questioning of a Prosecution Witness Regarding the Witness's Past Criminal History

In his next claim, Petitioner argues ineffectiveness of appellate counsel for failing to raise ineffectiveness of trial counsel for not objecting to the prosecutor's questioning of a prosecution witness regarding the witness's past criminal history. See Pet.'s Br. at 37-54. Respondents counter that this claim is meritless. See Answer at 28-32.

In addressing this claim on collateral appeal, the Pennsylvania Superior Court stated the following:

> During direct-examination, Mr. Kelsey testified that he pled guilty to the murders of Leroy Jackson, Jr., and Denise Walters. (N.T. 10/22/91, at 195). Mr. Kelsey testified that he entered into a negotiated plea agreement whereby he would plead guilty to the Jackson/Walters murders and testify that [Petitioner] confessed to murdering DeBose and, in exchange, the Commonwealth would recommend a lesser sentence for the Jackson/Walters murders. (N.T. 10/22/91, at 196-204). [Petitioner] argues

> that the prosecutor's questioning of Mr. Kelsey about Mr. Kelsey's guilty plea in the unrelated double-murders implicated [Petitioner] in those crimes, and, therefore, Mr. Kelsey should not have been permitted to testify about the Jackson/Walters murders or his negotiated guilty plea relating thereto.
>
> We have reviewed Mr. Kelsey's testimony. Mr. Kelsey never testified that [Petitioner] participated in the murders of Mr. Jackson and Ms. Walters, and contrary to [Petitioner's] argument, there is no indication that Mr. Kelsey's testimony created such an inference. The prosecutor questioned Mr. Kelsey about the Jackson/Walters murders in anticipation of the defense challenging Mr. Kelsey's credibility regarding [Petitioner's] confession to the murders of Ms. DeBose. As it was proper for the prosecutor to question Mr. Kelsey about his negotiated pleas on unrelated charges, we conclude trial counsel was not ineffective in failing to object, and appellate counsel was not ineffective in failing to raise the issue on direct appeal. Commonwealth v. Diggs, 570 EDA 2002, at 8-9 (Pa. Super. April 19, 2005) (footnotes omitted).

I find that the reasoning of the state court is neither contrary to, nor an unreasonable application of,

the standard set forth by the Supreme Court in Strickland. Petitioner characterizes Kelsey's testimony as "total fabrication," see Ptr.'s Br. at 39, and argues that counsel was constitutionally ineffective for not objecting to a line of questioning that allegedly implicated Petitioner in the murders of Jackson and Walters. However, as the Superior Court correctly explained, Kelsey never testified that Petitioner had anything to do with the Jackson and Walters murders, nor is there any indication that Mr. Kelsey's testimony created such an inference. To the contrary, it is both proper and commonplace for prosecutors to elicit damaging facts on direct examination, rather than allow defense counsel to undermine the credibility of a prosecution witness. To that end, the prosecutor elicited testimony from Kelsey that implicated himself – not Petitioner – in the two (2) unrelated murders. Trial counsel cannot be faulted for failing to object to a proper line of questioning, and thus appellate counsel cannot be faulted to failing to raise this claim on appeal. See Buehl, supra. Accordingly, Petitioner is not entitled to relief on this claim.

D. Trial Court Error In Instructing the Jury on Accomplice Liability, Conspiracy and Specific Intent, and Ineffectiveness of Appellate Counsel for Failing to Raise Ineffectiveness of Trial Counsel in This Regard

Petitioner next argues that the trial court erred in instructing the jury on accomplice liability, conspir-

acy, and specific intent, and that appellate counsel was ineffective for failing to raise a claim of ineffectiveness of trial counsel for not challenging these jury instructions. See Ptr.'s Br. at 54-64. Respondents counter that this claim is meritless. See Answer at 32-36.

In addressing this claim on collateral appeal, the Pennsylvania Superior Court stated the following:

> [Petitioner's] fourth claim is that the trial court erred in instructing the jury on criminal conspiracy and accomplice liability as it related to first-degree murder. Specifically, [Petitioner] contends the trial court's charge did not adequately inform the jury that an accomplice must share the specific intent to kill with the active partner in order to be convicted of first-degree murder and the court improperly instructed the jury regarding conspiracy. This claim is waived because it would have been raised on direct appeal. However, this does not end our inquiry because, in order to overcome waiver, [Petitioner] has raised a layered ineffective assistance of counsel claim. We conclude the underlying claim is meritless, and, therefore, [Petitioner's] ineffective assistance of counsel claims must fail.
>
> * * * *

> The [jury] instructions, when reviewed in totality, clearly and accurately indicated to the jury that, to find [Petitioner] guilty of murder in the first degree, it was necessary that they find [Petitioner] possessed the requisite specific intent to kill. The charge properly instructed the jury that they had to find that [Petitioner] acted with the specific intent of promoting or facilitating the commission of a willful or deliberate killing. As such, the instruction was not confusing and adequately informed the jury that an accomplice must also share the specific intent to kill with the active partner to be convicted of first-degree murder. Therefore, [Petitioner's] ineffective assistance of counsel claims fail.

Commonwealth v. Diggs, 570 EDA 2002, at 10, 13-14 (Pa. Super. April 19, 2005) (citations to state law omitted). The Superior Court reached the same conclusion regarding the jury instructions for conspiracy. See id. at 14.

As previously noted, jury instructions must be read as a whole and in context in order to determine whether an instruction was improper and, if so, whether the improper instruction infected the entire trial and thereby violated the petitioner's due process rights. Estelle, 502 U.S. at 72. Regarding accomplice liability, the trial court instructed the jury as follows:

The Criminal Code provides, in relevant part: A person is legally accountable for the conduct of another person when he is an accomplice of such other person in the commission of the offense.

It also says that a person is an accomplice of another person in the commission of an offense if, with the intent of promoting or facilitating the commission of the crime, he aids or agrees or attempts to aid such other person in planning or committing it.

To aid and abet in the commission of a crime, one must possess a shared intent to commit it.

One is an aider or abettor if he has joined in the commission of a crime, if he was an active partner in the intent which was the crime's basic element. The least degree of concert or collusion between parties to an illegal transaction makes the act of one the act of all.

While this must often be shown by circumstantial evidence, the proof must be more than to support suspicion or conjecture. Mere presence at the scene of the crime and knowledge of its commission are not sufficient to prove that one has agreed or at-

> tempted to aid and abet or is actually aiding and abetting in the commission of a crime.
>
> If one is only a terrified onlooker, neither his presence at the homicide nor his failure to report it would make him an accomplice, an aider or abettor or a co-conspirator.

(N.T. 10/24/91, at 397-398). In response to the jury's request for clarification, the trial court further stated the following:

> A person is really accountable for the conduct of another person when he is an accomplice of such other person in the commission of the offense.
>
> To aid and abet in the commission of a crime, one must possess a shared intent to commit it. One is an aider and abettor in the commission of a crime, that is he has joined in the commission, if he was an active partner in the intent which was the crime's basic element.

(N.T. 10/24/91, at 418-419).

In arguing that this jury instruction was constitutionally flawed, Petitioner relies on Everett v. Beard, 290 F.3d 500 (3d Cir. 2002), in which the Third Circuit found an accomplice liability jury instruction to be flawed where Everett was the getaway driver in

the robbery of a grocery store in which the robbers murdered two [2] people during the robbery. I find Petitioner's reliance on Everett to be misplaced. Given the facts in Everett, a reasonable jury may have thought that Everett intended to help his accomplices carry out a robbery, but not a murder. In contrast, this case involves one (1) horrific crime – the murder of a young woman who was stabbed approximately sixty-nine (69) times. It defies credulity to suggest that the jury could have found that Petitioner had the specific intent of "promoting or facilitating" the commission of any crime other than murder. As a result, the jury instruction was entirely appropriate.

Regarding conspiracy, the trial court instructed the jury as follows:

> Where two [2] or more join in the commission of an unjustified assault which results fatally, all are guilty, regardless of which one inflicts the mortal wound.
>
> Where two [2] or more combine to make an assault, and in carrying out such common purpose another is killed, the one who enters into the combination but does not personally commit the wrongful act is equally responsible for the homicide as the one who directly causes it.

(N.T. 10/24/91, at 396-397). In addition, the trial court twice stated the following: "Conspiracy is not synonymous with aiding and abetting. Conspiracy requires an agreement to commit a crime, plus an overt act." (N.T. 10/24/91, at 397, 418). Petitioner argues that the conspiracy instruction is constitutionally flawed because the jury may have convicted him of conspiracy on the theory that the only crime he agreed to commit was "a simple assault on the victim," see Ptr.'s Br. at 59, but then thought that was enough to also find him guilty of first-degree murder. I disagree. Judge Stout correctly instructed the jury that conspiracy consists of an agreement to commit a crime, plus an overt act. Under the gruesome circumstances of this case – and in the context of the jury instructions as a whole, including the instructions on first degree murder, infra – I find that Petitioner's argument is without merit.

Regarding the charge for murder in the first degree, the trial court instructed the jury as follows:

> I shall now define murder in the first degree.
>
> A criminal homicide constitutes murder of the first degree when it is committed by an unintentional killing.
>
> As used in this statute, intentional killing means, among other things, any willful, deliberate and premeditated killing.

> A killing is willful and deliberate if the defendant consciously decided to kill the victim, and it is premeditated if the defendant possessed a fully formed intent to kill at the time when he acted, even though there need not have been any appreciable amount of time between the time when the defendant first conceived the idea of killing and the time when he acted.
>
> The design to kill can be formulated in a fraction of a second.
>
> In determining whether or not the defendant committed the kind of intentional killing required for first degree murder, you should consider the testimony of the expert witnesses, as well as the other evidence which may shed light on what was going on in the defendant's mind at the time of the alleged killing.
>
> If the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may infer from that the killing was intentional.

(N.T. 10/24/91, at 391-392) (emphasis added). In response to the jury's request for clarification, the trial court first explained that "[a] criminal homicide constitutes murder in the first degree when it is committed by an intentional killing," and then repeated

the rest of its original first-degree murder charge verbatim. (N.T. 10/24/91, at 414-415).

Petitioner argues that he is entitled to relief because Judge Stout initially stated that first-degree murder was an unintentional, rather than an intentional, killing. I disagree. As an initial matter, it is impossible to determine whether the trial judge actually said "unintentional" or whether the word entered the transcript through a transcription error. Even assuming the judge mis-spoke, the immediate context of the charge would have clarified any misunderstanding. Moreover, the judge repeatedly instructed that a first degree murder must be an "intentional killing," as she did again when the jury asked for clarification. As a result, there is no reasonable probability that any juror would have been confused regarding the elements for first-degree murder.

For all of the aforementioned reasons, I find that the jury instructions, read as a whole, were proper. As a result, trial counsel cannot be deemed deficient for failing to object to the jury instructions, see Strickland, supra, and appellate counsel cannot be faulted to failing to raise this claim on appeal. Accordingly, Petitioner is not entitled to relief on this claim.

E. Double Jeopardy

Petitioner next argues that his double jeopardy rights were violated because he was tried four (4) times for the same offense – and because the fourth trial occurred as a result of this federal District Court finding that the prosecutor's peremptory challenges in Petitioner's third trial violated Batson. See Pet.'s Br. at 64-75. Respondents counter that this claim is meritless. See Answer at 37-44.

Petitioner exhausted this claim on both direct and collateral appeal. In addressing this claim on direct appeal, the Pennsylvania Superior Court stated the following:

> [Petitioner] . . . contends that the trial court erred in denying his motion to dismiss on double jeopardy grounds where the prosecutor was found to have acted improperly at an earlier trial by striking blacks solely on the basis of race. He maintains that striking prospective jurors solely on the basis of race was specifically undertaken to prejudice him and deprive him of a fair trial.
>
> We begin our analysis by noting that the federal district court concluded that the grant of a new trial would not subject [Petitioner] to double jeopardy in violation of the United States Constitution. . . .
>
> * * * *

> [The] record is devoid of evidence that the Commonwealth, in excluding black jurors [during the fourth trial], undertook to prejudice [Petitioner] and deprive him of a fair trial . . . .

Commonwealth v. Diggs, 3664 PHILA 1994, at 2-4 (Pa. Super. Aug. 15, 1996).

Petitioner raised the same claim on collateral appeal, at which time the Superior Court explained that the issue had been previously litigated and was therefore procedurally barred. Commonwealth v. Diggs, 570 EDA 2002, at 8 (Pa. Super. April 19, 2005). Nevertheless, the Superior Court stated the following in a footnote:

> In discussing his double jeopardy claim, [Petitioner] argues that he has newly-discovered evidence relating to racial discrimination in the jury selection process. He argues that a videotape revealing Philadelphia assistant district attorney Jack McMahon's views on jury selection reveal a policy of racial discrimination in the district attorney's office. The Supreme Court has repeatedly analyzed this issue and has concluded that the mere existence of the tape does not demonstrate that there was prejudice in a particular case. Commonwealth v. Morris, 822 A.2d 684 (Pa. 2003); Commonwealth v. Rollins, 738 A.2d 435 (Pa. 1999). As in the

> cases cited supra, [Petitioner] has made several bald assertions without providing any legal argument as to how the policy affected the jury selection in his particular case.

Commonwealth v. Diggs, 570 EDA 2002, at 8, n.12 (Pa. Super. April 19, 2005).

Here, Petitioner appears to argue that because peremptory challenges during his third trial were deemed, in a prior federal habeas petition, to have violated Batson, his subsequent re-trial – which resulted in his second conviction – somehow violated his double jeopardy rights. I cannot agree. Double jeopardy bars re-trial where the prosecutor's goal in the first trial was not to obtain a conviction, but rather to abort a trial likely to end in acquittal. See United States v. Williams, 472 F.3d 81, 85-86 (3d Cir. 2007) (stating retrial barred by double jeopardy when prosecutor subjectively intended to cause a mistrial and thereby retry the case). The prosecutor in Petitioner's earlier trial cannot be said to have deliberately violated the Constitution in jury selection because the Supreme Court did not decide Batson until nearly a decade after Petitioner's first conviction. In addition, the prosecutor in Petitioner's first full trial undoubtedly intended to win a conviction – and in fact did so. As a result, the District Court's decision to grant Petitioner's first federal habeas petition and order a new trial did not implicate double jeopardy.

To the extent Petitioner argues that the Jack McMahon videotapes prove that the Constitution was deliberately violated, such a claim fails. As the Superior Court properly explained, every court that has considered the question has concluded that the mere existence of the tapes does not demonstrate that there prejudice existed in other cases. See, e.g., Bond v. Beard, 2006 WL 1117862, at *3-4 (E.D. Pa. April 24, 2006); Abu- Jamal v. Horn, 2001 WL 1609690 (E.D. Pa. Dec. 18, 2001) (finding tape of former prosecutor's remarks irrelevant because, inter alia, it did not reflect view views of prosecutor who tried petitioner); Peterkin v. Horn, 988 F.Supp. 534, 541 (E.D. Pa. 1997).

In sum, I find that Petitioner's second full trial (and second conviction) did not implicate double jeopardy, and that the Jack McMahon videotapes did not demonstrate a pattern or practice of discrimination by the Philadelphia District Attorney's Office. Therefore, I find Petitioner is not entitled to relief on this claim.

F. Ineffectiveness of Appellate Counsel for Failing to Assert Trial Counsel's Ineffectiveness for Failing to Introduce Petitioner's Alibi Defense

Petitioner also argues that appellate counsel was ineffective for failing to assert trial counsel's ineffectiveness regarding Petitioner's alibi, specifically, that he was in Harrisburg, Pennsylvania, at the time

the victim was murdered in Philadelphia. See Pet.'s Br. at 76-83. Respondents counter that this claim is meritless. See Answer at 44-46. In addressing this claim on collateral appeal, the Pennsylvania Superior Court stated the following:

> Defense counsel testified that [Petitioner] told him that he was in Harrisburg, Pennsylvania, and that various witnesses would verify this fact. (N.T. 2/28/94, at 20-21). However, defense counsel further testified that he was unable to locate any of the witnesses and could not find anyone who would verify that [Petitioner] was in Harrisburg, Pennsylvania, when Ms. DeBose was murdered. (N.T. 2/28/94, at 21). Defense counsel indicated that he was concerned that if he specifically asked [Petitioner] where he was when Ms. DeBose was murdered the Commonwealth would ask [Petitioner] on cross-examination who he was with and why the witnesses were not testifying. (N.T. 2/28/94, at 22). During trial, defense counsel specifically asked [Petitioner] if he killed Ms. DeBose, to which [Petitioner] replied negatively, and defense counsel elicited testimony from [Petitioner] that he] called his wife from Harrisburg, Pennsylvania, the morning after the murder. (N.T. 10/23/91, at 340-341).

> Based on the aforementioned, we conclude defense counsel had a reasonable, strategic basis for not specifically asking [Petitioner] if he was in Harrisburg, Pennsylvania, when Ms. DeBose was murdered, and, therefore, [Petitioner's] layered ineffective assistance of counsel claim fails.

Commonwealth v. Diggs, 570 EDA 2002, at 16 (Pa. Super. April 19, 2005).

I find that the reasoning of the state court is neither contrary to, nor an unreasonable application of, the standard set forth by the Supreme Court in Strickland. The only evidence Petitioner offers regarding the existence and availability of the alleged alibi witnesses is the affidavits he included in the Appendix filed in connection with the present habeas petition – that is, in self-serving documents presented nearly thirty (30) years after the murder, and after multiple attorneys represented Petitioner through two (2) full trials and numerous appeals. Importantly, however, Petitioner's first trial counsel testified at the post-trial hearing that he was unable to locate any witnesses to support Petitioner's alibi – and this inability was apparently shared by the attorney who represented Petitioner in connection with his first, successful, habeas petition, as well as his 1991 retrial.

In any event, the decision not to ask Petitioner to testify as to his alibi was clearly a matter of trial

strategy, particularly insofar as counsel's unsuccessful attempt to locate allegedly corroborating witnesses would subject Petitioner to extremely damaging cross examination. (N.T. 2/28/94, at 21-22). Moreover, counsel testified that he did not prevent Petitioner from testifying about his alibi, nor did he instruct Petitioner to avoid brining up the subject during his testimony. (N.T. 2/28/94, at 24).

Based on the foregoing, I find that trial counsel cannot be deemed deficient for failing to introduce Petitioner's alibi defense, see Strickland, supra, and appellate counsel cannot be faulted to failing to raise this claim on appeal. Accordingly, Petitioner is not entitled to relief on this claim.

G. Trial Court Error in Failing to Provide Petitioner with Voir Dire Transcripts

In his next claim, Petitioner argues that the trial court violated his constitutional rights by failing to provide Petitioner with the trial transcripts from voir dire. See Pet.'s Br. at 84-91. Respondents counter that this claim is procedurally defaulted and meritless. See Answer at 47-51.

Petitioner raised this claim on collateral appeal, at which time the Pennsylvania Superior Court found it to have been waived because Petitioner could have raised the claim on direct appeal, but failed to do so. The Superior Court then stated the following:

> [Petitioner] attempts to overcome waiver by baldly asserting that appellate counsel should have raised on appeal trial counsel's ineffectiveness in assuring that the voir dire notes were transcribed. [Petitioner] asserts that "[i]f appellate counsel had read the docket entries and reviewed [the] pro se pet[i]tition's [sic] that were filed with the clerk in [the] lower court, he would have seen the probability that there might just be something to [Petitioner's] motions and allegations. He missed the mark." [Citation omitted.] [Petitioner's] general assertion is insufficient to overcome the presumption that counsel is competent.

Commonwealth v. Diggs, 570 EDA 2002, at 17 (Pa. Super. April 19, 2005).

For the reasons previously discussed, I find that this claim is procedurally defaulted by operation of the independent and adequate state ground doctrine, and that Petitioner has not overcome the default by a showing of cause and prejudice, or by showing that the failure to review this claim would be fundamentally unfair. Even assuming that Petitioner raised counsel's ineffectiveness prior to its use to show cause, as required by Edwards, supra – the underlying ineffectiveness claim has no merit. Defense counsel at Petitioner's retrial was the same attorney who prevailed on the Batson issue on appeal from Petitioner's first conviction. Therefore, it is entirely

reasonable to assume, not only that counsel was aware of Batson, but that he would have been extremely sensitive to a recurrence of the problem. In addition, the prosecutor, the trial judge, and half of the jurors who convicted Petitioner the second time were African-American. Under the circumstances, Petitioner's attorneys cannot be faulted for concluding that there was no reasonable basis to obtain the voir dire transcripts from Petitioner's retrial in order to search for a Batson violation. As a result, Petitioner's claim of trial court error regarding the voir dire transcripts remains procedurally defaulted.

In any event, I find no merit to Petitioner's claim of trial court error. Petitioner argues that the court "refused" to provide him with a copy of the voir dire transcripts. Assuming for the moment that the transcripts would have been useful in asserting a Batson claim,[12] it is unclear how Petitioner believes the state courts refused to provide him with transcripts in response to a proper request. If Petitioner is referring to a request for the transcripts made in a 1997 pro se motion, the Court notes that the request was made only in the conclusion section of the motion; the motion was filed after the Superior Court had already affirmed his second conviction on direct review; and

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[12] The underlying Batson claim is addressed separately, infra

the request included a clearly improper demand for a list of the names, races, and addresses of the jury venire members. Moreover, the state courts would not have entertained a pro se request filed by Petitioner while he was represented by counsel. See Commonwealth v. Pursell, 724 A.2d 293, 304 (Pa. 1999) (finding no right to consideration of pro se submissions when petitioner is represented by counsel).

For the aforementioned reasons, I find this claim of trial court error to be procedurally defaulted and, in any event, meritless.

H. Prosecutorial Misconduct in Improperly Excluding Black Venire Persons in Violation of Batson

In a related claim, Petitioner alleges prosecutorial misconduct in improperly excluding black venire persons in violation of Batson. See Pet.'s Br. at 91-98. Respondents counter that this claim is procedurally defaulted and meritless. See Answer at 51-54.

In addressing this claim on collateral appeal, the Pennsylvania Superior Court first found the claim waived because Petitioner failed to raise the claim on direct appeal, but proceeded to address the underlying claim because Petitioner included a layered ineffectiveness claim related to counsels' failure to raise or preserve the claim. The Superior Court then stated the following:

> Since the PCRA court did not hold a hearing, [Petitioner] has not had the opportunity to establish actual, purposeful discrimination at the post conviction stage. Therefore, we must determine whether [Petitioner's] proffer, if believed, would establish actual, purposeful discrimination.
>
> [Petitioner] states the prosecutor excluded young, black males from the jury and that such a pattern was established in [Petitioner's] prior trials. Aside from baldly asserting that the prosecutor excluded the young, black males for the same reasons established in [Petitioner's] prior trials, [Petitioner] has not developed this allegation further. We conclude such a proffer is insufficient . . .

Commonwealth v. Diggs, 570 EDA 2002, at 18-19 (Pa. Super. April 19, 2005) (citations to state law omitted).

I find this claim to be procedurally defaulted because the issue was not raised during trial or on direct appeal – a fact that is particularly revealing insofar as defense counsel at Petitioner's re-trial was the same attorney who helped him obtain a new trial based on Batson – and because Petitioner has not overcome the default for the same reasons previously discussed. Even were the claim not procedurally defaulted, however, there is absolutely no evidence of a

Batson violation in connection with Petitioner's second conviction. Although Petitioner argues that the prosecutor improperly excluded "young black males from the jury," see Ptr.'s Br. at 71, the Court notes that Batson has not been extended to cover alleged discrimination on the basis of age, and that Batson was not extended to cover gender discrimination in peremptory challenges until three (3) years after Petitioner's second conviction. In any event, as previously mentioned, the prosecutor, the trial judge and half of the jurors who convicted Petitioner the second time were African-American. Although this does not preclude the possibility of race discrimination in jury selection, it makes such discrimination extremely implausible, particularly considering that Petitioner was being retried on the basis of a previous Batson violation. Therefore, I find Petitioner is not entitled to relief on this claim.

I. Violation of Due Process For Excluding Evidence of the Acquittal of Petitioner's Accomplice, And Layered Ineffectiveness of Counsel for Failing to Raise and Preserve This Claim

Petitioner next argues that his due process rights were violated when the trial court excluded evidence of the acquittal of Petitioner's accomplice, Alfred Clark; that trial counsel was ineffective for failing to object in this regard; and that appellate counsel was ineffective for failing to preserve this claim on appeal. See Pet.'s Br. at 98-108. Respondents counter

that this claim is procedurally defaulted and meritless. See Answer at 55-57.

In addressing this claim on collateral appeal, the Pennsylvania Superior Court first found it waived because Petitioner failed to raise the claim on direct appeal, but proceeded to reach the merits because Petitioner included a layered ineffectiveness claim related to counsels' failure to raise or preserve the issue. The Superior Court then stated the following:

> [A] person accused of a crime may not introduce evidence of the acquittal of another person charged in connection with the same episode to create an impression before the jury that the defendant is equally innocent. [There is] only one narrow exception to this general rule – the defendant may introduce evidence of another person's acquittal where that person testified for the defense and the acquittal is introduced for the limited purpose of removing the cloud of criminal charges over [the defense] witness, created by the Commonwealth evidence . . . .

Commonwealth v. Holloway, 739 A.2d 1039, 1044 (1999).

> Here, the exception is inapplicable because [Petitioner] did not call Aldred Clark to testify. Consequently, there was no "cloud of criminal charges". over Mr. Clark and no

> need to rehabilitate Mr. Clark's credibility by reference to his acquittal. Id. Instead, [Petitioner] sought to use evidence of Mr. Clark's acquittal to bolster his own credibility, which case law does not permit. Id. Therefore, [Petitioner's] underlying claim lacks arguable merit, and his ineffective assistance of counsel claims must fail.

Commonwealth v. Diggs, 570 EDA 2002, at 19 (Pa. Super. April 19, 2005) (footnotes omitted).

Because the Superior Court found the underlying claim of trial court error to have been waived, I find the claim to be procedurally defaulted by operation of the independent and adequate state ground doctrine. Although ineffectiveness of counsel can constitute cause sufficient to excuse the default, I further find that Petitioner's related claim of ineffective assistance of counsel is without merit. As explained by the Superior Court, Pennsylvania rules of evidence precluded the defense from introducing Clark's acquittal as evidence that Diggs was innocent of the same crime, and the only exception to the rule did not apply. Given this clear Pennsylvania rule of evidence, counsel cannot be deemed ineffective for not attempting to have Clark's acquittal entered into evidence. Because alleged ineffectiveness cannot serve as cause to excuse the default of this claim,

this claim remains procedurally defaulted.[13] Therefore, federal review of this claim is barred.

J. Violation of Due Process By Having to Wear Prison Clothes at Trial

Petitioner also argues that his due process rights were violated when he was forced to stand trial in prison clothes until approximately the third day of trial. See Pet.'s Br. At 108-118. Respondents counter that this claim is procedurally defaulted and meritless. See Answer at 58-61.

The Supreme Court has held that compelling a defendant to stand trial before a jury wearing prison clothes may constitute a due process violation, but that the failure to make an objection to the court regarding such clothing negates the presence of compulsion necessary to establish a constitutional violation. See Estelle v. Washington, 425 U.S. 501, 512-513 (1976). In addition, federal courts have held that standing trial in prison-issued clothing that is not clearly identifiable as prison-issued does not vio

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[13] In any event, I would find the underlying 13 due process claim to be meritless for the same reason that counsel cannot be deemed ineffective – namely, because Pennsylvania evidentiary law clearly precludes the admissibility of the very evidence that Petitioner alleges to have been improperly excluded

late due process. See, e.g., United States v. Henry, 47 F.3d 17, 22 (2d Cir. 1995) (deferring to trial court's finding that defendant's clothes were not clearly identifiable as prison issue); Jefferson v. Sherrer, 2005 WL 2777557, at *6-7 (D.N.J. Oct. 25, 2005) (holding state court reasonably found clothing not readily identifiable as prison-issue).

In addressing this claim on collateral appeal, the Pennsylvania Superior Court first found the claim waived because Petitioner failed to raise the claim on direct appeal, but proceeded to reach the merits because Petitioner included a layered ineffectiveness claim related to counsels' failure to raise or preserve the issue. The Superior Court then stated the following:

> During the hearing on [Petitioner's] post-trial motion, [Petitioner] testified that, until the third day of trial, he wore a white shirt, powder blue pants, and boots, all of which were prison-issued. (N.T. 2/28/94, at 47-49). He further testified that defense counsel gave him a suit jacket to wear over the shirt. (N.T. 2/28/94, at 48). The trial judge indicated that she could not tell that [Petitioner] was wearing prison-issued clothing. (N.T. 2/28/94, at 47).
>
> The [Pennsylvania] Supreme Court has disapproved the trial court forcing a defendant, who was incarcerated prior to trial, to at

tend trial in identifiable prison clothing, and this Court has held that counsel's failure to object to the appearance of a defendant before the jury in prison garb is a serious omission. . . .

Here, [Petitioner] has failed to offer proof that the jury was aware that [Petitioner] was clothed, in part, in prison attire, and [Petitioner] has failed to establish that the clothing was marked or identified as prison attire. In fact, the trial judge indicated that she could not tell that [Petitioner] was wearing prison-issued short, pants and boots. As such, we find there is no arguable merit to [Petitioner's] claim.

In any event, assuming, arguendo, that there is arguable merit to [Petitioner']s claim, we conclude that the evidence against [Petitioner] was overwhelming and there is no reasonable probability that but for [Petitioner's] appearance the outcome of his case would have been different. Therefore, we conclude that [Petitioner] has failed to establish

the prejudice prong, and counsel cannot be found ineffective on this basis.

Commonwealth v. Diggs, 570 EDA 2002, at 20-22 (Pa. Super. April 19, 2005) (citations to state law omitted).

Because the Superior Court found the underlying claim of trial court error to have been waived, I find the claim to be procedurally defaulted by operation of the independent and adequate state ground doctrine. Although ineffectiveness of counsel can constitute cause sufficient to excuse the default, I further find that Petitioner's related claim of ineffective assistance of counsel is without merit. As explained by the Superior Court, Judge Stout stated during Petitioner's post-trial motions that she was "very careful" not to "allow people in [court when a jury is present] with anything that can be recognized as prison clothing," and that if Petitioner had been wearing prison clothes, "I couldn't tell." (N.T. 2/28/94, at 47, 49). Given this statement from an experienced presiding judge – and in the absence of evidence that any member of the jury thought otherwise – it is highly unlikely that the clothes Petitioner wore during the first three (3) days of the trial were identifiable as prison-issue. As a result, counsel cannot be faulted for obtaining non prison issue clothing at the start of trial.[14] Because alleged inef-

[14] Moreover, even if counsel is deemed to have performed deficiently in this regard, Petitioner cannot demonstrate prejudice. As the Superior Court correctly explained, the evidence in this case was overwhelming.

fectiveness cannot serve as cause to excuse the default of this claim, this claim remains procedurally defaulted.[15] Therefore, federal review of this claim is barred.

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[15] In any event, I find that Petitioner would not be entitled to relief on the merits. Petitioner's reliance on Gaito v. Brierley, 425 F.2d 86 (3d Cir. 1973), and Lemons v. United States, 489 F.3d 344 (3d Cir. 1974), is misplaced. In Gaito, the Third Circuit found that the District Court's factual determination that the petitioner's clothes were not recognizable as prison-issue was clearly erroneous on the basis of the evidence presented in that case; and in Lemons, the Third Circuit remanded the case to the District Court for a factual determination as to whether the defendant's clothing was identifiable as prison-issue. Here, Judge Stout made a factual determination that Petitioner did not wear clothing reasonably identifiable as prison-issue, and Petitioner has presented the court with insufficient evidence to overcome this factual determination by clear and convincing evidence, as required. See 28 U.S.C. §2254(e). As a result, Petitioner would not entitled to relief on the merits.

K. Trial Court Error in Sentencing, and Layered Ineffectiveness of Counsel for Failing to Raise and Preserve This Claim

Petitioner next argues that his sentence was unconstitutional, and that all counsel were ineffective for failing to raise or preserve this claim. See Pet.'s Br. at 119-124. Specifically, Petitioner argues that the sentence handed down by Judge Stout after his second conviction – life imprisonment consecutive to the life sentence he was already serving – was vindictive insofar as Judge Malmed had originally sentenced him to life imprisonment concurrent to the life sentence he was already serving. Respondents counter that the claim is meritless. See Answer at 61-66.

In addressing the sentencing issue on collateral appeal, the Pennsylvania Superior Court stated the following:

> [Petitioner] argues that, after his 1977 conviction, Judge Edwin Malmed sentenced [Petitioner] to life in prison, to run concurrently to a life sentence [Petitioner] was serving regarding an unrelated murder. Following his retrial and 1991 conviction, Judge Juanita Kidd Stout also sentenced [Petitioner] to life in prison; however, Judge Stout made the sentence consecutive to the life in prison sentence [Petitioner] was serv-

> ing for the unrelated murder. Relying on North Carolina v. Pearce, 395 U.S. 711 (1969), [Petitioner] argues the trial court was not permitted to impose a consecutive sentence unless the trial court had new information justifying the harsher sentence, and, therefore, his sentence was a product of illegal vindictiveness. We find no arguable merit.
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> * * * *
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> In [Commonwealth v. Mikesell, 537 A.2d 1372, 1380 (Pa. Super. 1988)], this Court held that no presumption of vindictiveness applies when the judge who imposed the original sentence is different than the judge who imposed the new sentence following a successful appeal. We further held that "[i]n the absence of a presumption, 'the defendant must affirmatively prove actual vindictiveness'." Mikesell, 537 A.2d at 1381. [Petitioner] has not set forth a case of actual vindictiveness, and, therefore, we find to merit to his layered ineffective assistance of counsel claim.

Commonwealth v. Diggs, 570 EDA 2002, at 22-23 (Pa. Super. April 19, 2005) (citations to state law omitted).

I find that the reasoning of the state court is neither contrary to, nor an unreasonable application of, Supreme Court precedent. In North Carolina v. Pearce, 395 U.S. 711 (1969), the Supreme Court stated that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reason for his doing so, must affirmatively appear." 395 U.S. at 725-726. However, the scope of this holding has been repeatedly narrowed. The Supreme Court has made clear that it is only the possibility of vindictiveness on the part of the sentencing judge, rather than the increased sentence itself, that raises concern. See McCullough v. Texas, 475 U.S. 134, 138 (1986) ("Beyond doubt, vindictiveness of a sentencing judge is the evil the Court sough to prevent [in Pearce] rather than simply enlarged sentences after a new trial"). Moreover, there is no presumption of vindictiveness when the shorter first sentence and the longer second sentence following retrial are imposed by different judges. Id. at 140; see also United States v. Clark, 84 F.3d 506, 508 (1st Cir. 1996) (same); United States v. Anderson, 440 F.3d 1013, 1016-1017 (8th Cir. 2006).

Here, Petitioner was convicted and sentenced twice for the same crime, following separate jury trials that were fourteen (14) years apart and presided over by different judges. Assuming, arguendo, that the two (2) consecutive life sentences imposed by Judge Stout in 1991 constitutes a longer sentence than the two (2) concurrent life sentences imposed

by Judge Malmed in 1977, no presumption of vindictiveness attaches. To the contrary, as eloquently explained by the Eighth Circuit, "[t]o apply a presumption of vindictiveness in such circumstances – where the second sentencer had no personal stake in the prior proceedings – would require an inference of institutionalized hostility towards the exercise of appellate rights or a collusive arrangement between judges to have one exact vindication for another. There is no evidence to suggest such a lack of professionalism among judges, and we are unwilling to make such inferences." Anderson, 440 F.3d at 1016-1017. The same can be said of the present matter, in which there is no evidence of vindictiveness on the part of Judge Stout when she sentenced Petitioner in 1991.[16] Accordingly, Petitioner is not entitled to relief on this claim.

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[16] Petitioner implies vindictiveness by positing an unsupported theory that Judge Stout increased Petitioner's sentence because she knew that Petitioner had been implicated in an unrelated double homicide (for which he had been acquitted), and that trial counsel was therefore ineffective for failing to seek Judge Stout's recusal. See Ptr.'s Br. at 119. Any ineffectiveness claim so raised is patently unexhausted and procedurally defaulted. In any event, a sentencing judge is permitted to consider various facts in determining what sentence to impose, including other criminal conduct of which there is evidence, even if Petitioner was ultimately acquitted. See, e.g., United

L. PCRA Court Error in Failing to Grant an Evidentiary Hearing on Affidavits Submitted by Witnesses Attacking the Credibility of Ricardo Kelsey

Petitioner next argues the PCRA court erred in failing to grant an evidentiary hearing on affidavits submitted by fellow inmates Giles and VanHook attacking the credibility of Ricardo Kelsey. See Pet.'s Br. at 125-130. In support of this claim, Petitioner argues that he became aware of exculpatory evidence not available to him at the time of his fourth trial, namely, the recantation of Kelsey's testimony regarding Petitioner's jailhouse confession, and evidence that Kelsey was forced to lie to avoid the death

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States v. Horne, 474 F.3d 1004 (7th Cir. 2007) (J. Posner) (finding no error in considering, for sentencing purposes, criminal conduct of which the defendant was acquitted, but for which evidence existed); see also McMillan v. Pennsylvania, 477 U.S. 79, 92 (1986) ("Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime, [citation omitted], without suggesting that those facts must be proved beyond a reasonable doubt"). Doing so is not being vindictive, but rather judicious.

penalty. Respondents counter that this claim is meritless. See Answer at 66-69.

The state courts addressed this claim twice on collateral appeal. In its first post conviction opinion, the Pennsylvania Superior Court found that the PCRA court did not err in failing to grant an evidentiary hearing because neither Giles, nor VanHook, actually stated in their affidavits that Kelsey told either of them that he had lied. Commonwealth v. Diggs, 570 EDA 2002, at 7 (Pa. Super. Oct. 10, 2003). In addressing this claim a second time on remand, the Superior Court stated the following:

> [Petitioner] contends that the PCRA court should have held an evidentiary hearing to consider newly discovered evidence, namely two [2] affidavits which were submitted by fellow inmates, Giles and VanHook. [Petitioner] contends that both inmates indicated in their affidavits that Ricardo Kelsey told them he lied at trial about [Petitioner's] involvement in the murder. We agree with the PCRA court that Giles and VanHook did not specifically assert in their affidavits that Kelsey told them that he lied at trial . . . and we note that noticeably absent is an affidavit from Kelsey indicating that he lied at trial. As such, we conclude that the PCRA court did not err in failing to hold an evidentiary hearing concerning the inmates' affidavits.

Commonwealth v. Diggs, 570 EDA 2002, at 7 (Pa. Super. Oct. 10, 2003).

Petitioner's claim of error on the part of the PCRA court is not cognizable in a federal habeas petition. Federal habeas courts are authorized to provide relief only where a petitioner is in custody or under a sentence imposed in violation of the Constitution or the laws or treaties of the United States. See 28 U.S.C. §§ 2254-2255. "Thus, the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation." Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998), cert. denied, 526 U.S. 1065 (1999) (emphasis in original); see also Taylor v. Carroll, 2006 WL 278542, at *2 (D. Del. Feb. 6, 2006) (stating "[t]he Fourth, Fifth, Sixth, Ninth, Tenth and Eleventh Circuits agree that an alleged error in a state collateral proceeding does not provide a basis for federal habeas relief"). Because a claim of PCRA court error does not constitute a free-standing constitutional claim – particularly where the claim essentially relates to an alleged evidentiary error – federal review of this claim is barred.[17]

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[17] Even were I to find that this is a cognizable constitutional claim – which I do not – I would agree with the determination of the state courts. As an initial matter,

M. Prosecutorial Misconduct in Closing Argument

Lastly, Petitioner argues that his due process rights were violated when the prosecutor made several allegedly improper statements during closing argument.[18] See Pet.'s Br. at 131-139. Respondents

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Petitioner seeks to rely upon affidavits that raise substantial credibility issues insofar as the affiants are fellow prisoners serving long prison sentences, and the affidavits concern statements allegedly made to them by another long-term prisoner. In any event, the Superior Court correctly observed that neither affidavit explicitly asserts that Kelsey admitted lying at Petitioner's trial. Because I find no fault with the reasoning of the state courts, Petitioner would not be entitled to relief.

[18] Consideration of this claim is complicated by two (2) factors. First, although Petitioner captions this claim as one of due process arising from prosecutorial misconduct, see Ptr.'s Br. At 131, his discussion vacillates between trial court error (presumably for failing to admonish the prosecutor, even in the absence of objections by defense counsel) and ineffectiveness of counsel (for failing to object to various statements made by the prosecutor). Because the state court reviewed this claim solely in the context of counsel's ineffectiveness, I will proceed to address the merits on that basis. Second, although Petitioner identified six (6) of the prosecutor's statements as problematic when he brought this claim on direct appeal, Petitioner presently identifies some, but not all, of those

counter that this claim is meritless. See Answer at 69-72.

The Supreme Court "has recognized that prosecutorial misconduct may 'so infec[t] the trial with unfairness as to make the resulting conviction a denial of due process.'" Greer v. Miller, 483 U.S. 756, 765 (1987) (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)); Darden v. Wainwright, 477 U.S. 168 (1986). To constitute a due process violation, the prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer, 483 U.S. at 765 (citation omitted) (quoting United States v. Agurs, 427 U.S. 97, 108 (1976)); Smith v. Phillips, 455 U.S. 209, 211 (1982); see also Ramseur v. Beyer, 983 F.2d 1215, 1239 (3d Cir. 1992) (stating court must distinguish between ordinary trial error and egregious conduct that amounts to a denial of due process). The alleged misconduct must be viewed in the context of the entire proceedings. Donnelly, 416 U.S. at 643.

In addressing this claim on direct appeal (in the context of ineffectiveness of counsel for failing to object to the prosecutor's statements), the Pennsyl-

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statements, and raises several others. See Ptr.'s Br. at 131-139. To the extent Petitioner's present claim implicates statements made by the prosecutor that were never challenged in the state courts, I find those aspects of the claim to be unexhausted and procedurally defaulted.

vania Superior Court first set forth the standard for evaluating the statements of a prosecutor, and then stated the following:

> [Petitioner] cites the following statements by the prosecution as constituting prosecutorial misconduct:
>
> 1. That if the basement floor and walls could talk they would say [Petitioner] was responsible for the victim's death.
>
> 2. Called [Petitioner] a liar and gave his personal opinion of [Petitioner's] veracity.
>
> 3. Referred to the killing as a "slaughter" and an "annihilation."
>
> 4. Referred to [Petitioner] as a "vampire."
>
> 5. Asked the jury to find [Petitioner] guilty so that the victim's soul could rest in peace.
>
> 6. Remarked that [Petitioner] was a "beast,' "inhumane," and "heartless"; and equated the killing to "animal abuse" and "war crimes."
>
> After reviewing each of the alleged instances of misconduct, and in consideration

> of the extraordinarily brutal nature of the killing, we conclude that [Petitioner] has either taken the comments of the prosecution out of context or misstated the controlling caselaw. After examining these comments in context and in light of our caselaw, we cannot conclude that they created bias and hostility on the part of the jury such that it could not render a true verdict. As such, this ineffectiveness claim fails.

Commonwealth v. Diggs, 3664 PHILA 1994, at 7-8 (Pa. Super. Aug. 15, 1996) (citations to state law omitted).

I find that the state court determination is neither contrary to, nor an unreasonable application of, the standard for ineffectiveness set forth in Strickland. There is no question that the prosecutor took considerable poetic license with some of his statements. Nevertheless, it cannot be said the prosecutor's statements were so outrageous as to render the entire trial fundamentally unfair – particularly given the brutality of the crime and the extent of the evidence against Petitioner. See Darden, supra. Moreover, trial counsel testified that he considered at least some of the prosecutor's remarks to be "harmless anecdote," and that he rarely objects during prosecutors' closing arguments "unless it really is offensive . . . because it tends to highlight what I am objecting to and focus the jury's attention [on it.]" (N.T. 2/28/94, at 27-28). For example, although de-

fense counsel testified that he could not recall with certainty why he did not object when the prosecutor equated Petitioner with a vampire, counsel may have concluded that any discussion of the victim's blood loss could further his contention that the victim was too badly wounded to have identified Petitioner (or anyone else) as her killers. (N.T. 2/28/94, at 31-32).

In sum, I find the state court's determination regarding the prosecutor's statements to be reasonable, and that, in any event, trial counsel's decision not to object to the statements constituted a reasonable trial strategy. See Strickland, supra. Therefore, I further find that Petitioner is not entitled to relief on this claim.

Accordingly, I make the following:

RECOMMENDATION

AND NOW, this 28th day of March, 2007, IT IS RESPECTFULLY RECOMMENDED that the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 be DENIED. There has been no substantial showing of the denial of a constitutional right requiring the issuance of a certificate of appealability.

/s/ Peter B. Scuderi
PETER B. SCUDERI
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CHARLES KIRK DIGGS	:	CIVIL ACTION
v.	:	No. 06-cv-0024
DAVID DIGUGLIELMO, et al.	:	

ORDER

AND NOW, this day of , upon careful and independent consideration of the petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and after review of the Report and Recommendation of United States Magistrate Judge Peter B. Scuderi, and any objections made thereto, IT IS ORDERED that:

1. The Report and Recommendation is APPROVED and ADOPTED.

2. The petition filed pursuant to 28 U.S.C. § 2254 is DENIED.

3. There is no basis for the issuance of a certificate of appealability.

BY THE COURT:

JOHN R. PADOVA, J.

APPENDIX E – MEMORANDUM OPINION, DATED NOVEMBER 14, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
PENNSYLVANIA

CHARLES KIRK DIGGS : CIVIL ACTION

v. :

DAVID DIGUGLIELMO, et al NO. 06-24

MEMORANDUM

Padova, J. November , 2007

Petitioner Charles Kirk Diggs has filed a counseled petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In a Report and Recommendation dated March 28, 2007, Magistrate Judge Scuderi recommended that Diggs's petition be denied and that no certificate of appeal ability be issued. Presently before the Court are Diggs's counseled objections to the Report and Recommendation, as well as Diggs's *pro se* objections. For the following reasons, the objections are overruled and the Report and Recommendation is adopted as the decision of the Court.

I. FACTS AND PROCEDURAL HISTORY

On February 12, 1974, 18-year-old Linda DeBose was stabbed to death in the basement of her home on Medary Avenue in Philadelphia.[1] Linda's mother, Alice DeBose, returned from work at approximately 11:20 p.m. on February 12 and found her daughter lying in a pool of blood. Linda was rushed to Albert Einstein Medical Center where she later died. In a dying declaration, Linda was able to identify her attackers by name to both her mother and to the police. Trial testimony revealed that Linda was stabbed approximately 69 times in the throat, arms, and upper body, and then left to die. Within three hours of the murder, Philadelphia police arrested Louis Riggins, Diggs's co-conspirator. Diggs was arrested in June 1974 in Chester, Pennsylvania, where he had been hiding under several assumed names. Diggs was released on bail and fled from authorities. After alluding authorities for an additional two years, Diggs was arrested again in Philadelphia on May 17, 1976.

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[1] The factual recitation of Diggs's crimes is adopted from the Pennsylvania Superior Court's recitation in its opinion denying Diggs's direct appeal following his conviction. Commonwealth v. Diggs, No. 570 EDA 2002, at 2 (Pa. Super. April 19, 2005).

On November 3, 1977, a jury sitting before the Honorable Edwin Malmed, Court of Common Pleas of Philadelphia County, found Diggs guilty of first-degree murder, criminal conspiracy, possession of an instrument of crime, and prohibited weapons. This conviction was obtained following Diggs's third trial. The first trial ended when Diggs requested the opportunity to obtain new counsel; his second ended in a mistrial when members of the jury were exposed to newspaper coverage of the case. Judge Malmed sentenced Diggs to life imprisonment, concurrent to any other sentences he may be serving. Diggs's co-conspirator, Louis Riggins, was convicted of first-degree murder and criminal conspiracy in a separate trial, and sentenced to life imprisonment. A third defendant, Alfred Clark, was acquitted on all charges in a separate trial.

After pursuing his appellate rights under Pennsylvania law, Diggs filed a federal writ of habeas corpus in 1990. On March 27, 1991, the Honorable John P. Fullam granted federal habeas corpus relief on the grounds that in Diggs's 1977 jury trial, the prosecution had systematically excluded black venire persons by challenging them solely on the basis of race. Diggs v. Vaughn, Civ. A. No. 90-2083, 1991 WL 46319 (E.D. Pa. March 27, 1991). The District Court ordered a new trial pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), a case decided while Diggs's appeal had been pending in the state courts.

Diggs was retried before the Honorable Juanita Kidd Stout in October 1991. On October 25, 1991, Diggs was again convicted by a jury of first-degree murder, criminal conspiracy, possession of an instrument of crime, and prohibited weapons. Judge Stout sentenced Diggs to life imprisonment for the murder conviction, consecutive to any other sentences he was then serving.

Diggs filed a direct appeal with the Pennsylvania Superior Court raising various claims. The Superior Court affirmed the judgment of sentence in a memorandum opinion on August 15, 1996. Commonwealth v. Diggs, No. 3664 PHILA 1994, slip op. at 1-9 (Pa. Super. Aug. 15, 1996). The Pennsylvania Supreme Court denied Diggs's petition for allowance of appeal, Commonwealth v. Diggs, 698 A.2d 592 (Pa. 1997) (table), and the United States Supreme Court denied his petition for writ of certiorari Diggs v. Pennsylvania, 522 U.S. 1124 (1998) (table).

On January 27, 1999, Diggs filed a pro se petition under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa. Con. Stat § 9541, et seq. The PCRA court appointed counsel and two amended PCRA petitions were subsequently filed. The PCRA court dismissed the petition without a hearing by order dated January 8, 2002. Diggs filed a pro se notice of appeal on February 1, 2002. On February 6, 2002, pursuant to Pa. R. A. P. 1925(b), the PCRA court or-

dered Diggs to file a Concise Statement of Matters Complained of on Appeal. On March 25, 2002, the PCRA court issued an opinion explaining its denial of Diggs's PCRA petition. On October 10, 2003, the Superior Court affirmed the dismissal of the PCRA petition, finding that Diggs waived all but one of the issues raised in his petition due to his failure to properly file a statement of matters complained of on appeal in accordance with Pa. R. A. P. 1925(b). Commonwealth v. Diggs, No. 570 EDA 2002 (Pa. Super. Oct. 10, 2003). After the Superior Court denied Diggs's motion for reconsideration, he filed a petition for allowance of appeal in the Pennsylvania Supreme Court. On September 16, 2004, the Pennsylvania Supreme Court remanded the case to the Superior Court and instructed the Superior Court to address the merits of the issues raised by Diggs in the 1925(b) statement that was docketed Magistrate Judge Scuderi identified these issues from the 139-page Amended Petition filed by the Petitioner. Petitioner does not object to the Magistrate Judge's listing of his asserted claims on February 28, 2002. Commonwealth v. Diggs, 858 A.2d 1160 (Pa. 2004). The Superior Court affirmed the denial of PCRA relief in a memorandum opinion on April 19, 2005. Commonwealth v. Diggs, 570 EDA 2002, at 24 (Pa. Super. April 19, 2005) (hereinafter the "PCRA Appeal Opinion"). The Pennsylvania Supreme Court denied Diggs's request for allowance of appeal following this decision by the Pennsylvania Superior

Court. Commonwealth v. Diggs, 890 A.2d 1056 (Pa. 2005) (table).

On January 4, 2006, Diggs filed the present counseled petition for writ of habeas corpus. On October 6, 2006, Diggs filed an "Amended Petition for Habeas Corpus Relief Pursuant to 28 U.S.C. § 2254 et seq. and Amended Brief Submitted in Support of Habeas Corpus Petition Filed Pursuant to 28 U.S.C. § 2254 et seq." He raises the following claims:[2]

1. Denial of right to effective assistance of counsel when the state court failed to colloquy him about his wish to be represented by effective counsel on post verdict motions and after the denial of his PCRA petition, and layered ineffectiveness of counsel in this regard;

2. Trial court error in instructing the jury that impending death provides the assurance of truthfulness, and layered ineffectiveness of counsel for failing to raise and preserve this claim;

3. Ineffectiveness of appellate counsel for failing to raise ineffectiveness of trial counsel for not objecting to the prosecutor's questioning of a

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[2] Magistrate Judge Scuderi identified these issues from the 139-page Amended Petition filed by the Petitioner. Petitioner does not object to the Magistrate Judge's listing of his asserted claims.

prosecution witness regarding the witness's past criminal history;

4. Trial court error in instructing the jury on accomplice liability, conspiracy, and specific intent, and ineffectiveness of appellate counsel for failing to raise ineffectiveness of trial counsel for not challenging these jury instructions;

5. Violation of double jeopardy rights in having four trials for the same offense;

6. Ineffectiveness of trial counsel for failing to present Petitioner's alibi defense, and ineffectiveness of appellate counsel for failing to preserve the claim on appeal;

7. Trial court error in failing to provide Petitioner with the trial transcripts from voir dire;

8. Prosecutorial misconduct in improperly excluding black venire persons in violation of Batson;

9. Violation of due process by excluding evidence of the acquittal of Petitioner's co-defendant, Alfred Clark, and layered ineffectiveness of counsel for failing to raise and preserve this claim;

10. Violation of due process for having to wear prison clothes at trial;

11. Trial court error in increasing Petitioner's sentence after trial, and layered ineffectiveness of counsel for failing to raise and preserve this claim;

12. Trial court error for failing to grant an evidentiary hearing on affidavits submitted by witnesses attacking the credibility of Ricardo Kelsey; and

13. Prosecutorial misconduct in closing argument.

On March 28, 2007, Magistrate Judge Scuderi submitted a Report and Recommendation that the petition be denied. (Docket Entry # 18.) On April 11, 2007, Diggs filed pro se Objections to the Magistrate Judge's Report and Recommendation (Docket No. 19) ("the pro se Objections"), and pro se "Supplemental Objections Motion for a Evidentiary Hearing Petitioner's Motion for a Copy of the Record Relevant to the Issues Before this Court" (Docket No. 20). On May 19, 2007, Diggs filed a counseled "Petitioner's Objections to Magistrates Report and Recommendation" ("the counseled Objections"). (Docket No. 23). Respondents filed a Response to the objections on May 25, 2007. (Docket No. 24). Finally, Diggs filed a pro se Reply to the Response. (Docket No. 27).

II. STANDARDS

A. Exhaustion and Procedural Default

A prerequisite to the issuance of a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment is that the petitioner must have "exhausted the remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1)(A); O'Sullivan v. Boerckel, 526 U.S. 838, 842 (1999). Exhaustion requires that a petitioner "give state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." Id. at 845. To satisfy the requirements of exhaustion, petitioners must "fairly present" their claims to the state courts, which means that petitioners must present the factual and legal substance of a particular claim to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d 255, 261 (3d Cir. 1999) (citing Anderson v. Harless, 459 U.S. 4, 6 (1982) and Picard v. Connor, 404 U.S. 270, 277-78 (1971)). The exhaustion requirement may be excused if requiring exhaustion would be futile. Werts v. Vaughn, 228 F.3d 178, 192 (3d Cir. 2000) (citing cases); see also McCandless, 172 F.3d at 260 ("When a claim is not exhausted because it has not been 'fairly presented' to the state courts, but state procedural rules bar the applicant from seeking further relief in the state courts, the exhaustion requirement is satisfied because there is 'an absence of available State correc-

tive process.'" (quoting 28 U.S.C. § 2254(b))). However, in such a situation, a petitioner is considered to have procedurally defaulted the claim. Id.

The procedural default doctrine prohibits federal courts from reviewing a state court decision involveing a federal question if the state court decision is based on a rule of state law that is independent of the federal question and adequate to support the judgment. Bronshtein v. Horn, 404 F.3d 700, 707 (3d Cir. 2005). A state rule is "independent and adequate" if "(1) the rule speaks in unmistakable terms; (2) all state appellate courts refused to review the petitioner's claim on the merits; and (3) their refusal was consistent with other decisions." Nara v. Frank, 488 F.3d 187 (3d Cir. 2007) (citing cases). State procedural rules have been found to be inadequate if "they are not firmly established and regularly followed or if they are novel or unforeseeable." Bronshstein, 404 F.3d at 707 (internal citation and quotations omitted). This ensures that a petitioner has fair notice of the need to follow a state procedural rule. Id. The Commonwealth bears the burden of demonstrating that a state procedural rule is adequate to preclude federal habeas review. See Lark v. Beard, Civ. A. No. 01-1252, 2006 WL 1489977, *11 (E.D. Pa. May 23, 2006) (citing cases). Whether a state rule is firmly established and regularly applied is determined as of the date the default occurred and not as of the date the state court relied on it. Doctor v. Walters, 96 F.3d 675, 683-84 (3d Cir. 1996).

A procedural default may be excused and federal courts may consider the merits of a procedurally defaulted claim if the petitioner establishes "cause and prejudice" or a "fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722,750 (1991). To establish cause, the petitioner must "show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488 (1986). Ineffective assistance of counsel can constitute cause; however, the ineffective assistance of counsel claim must have been presented to the state courts as an independent claim before it may be used to establish cause for a procedural default. Id. at 488-89; Edward v. Carpenter, 529 U.S. 446, 451 (2000). To establish prejudice, a petitioner must prove "not merely that the errors at . . . trial created a possibility of prejudice, but that they worked to [the petitioner's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Werts, 228 F.3d at 193 (quoting Murray, 477 U.S. at 494). This standard requires the petitioner to show that he was denied "fundamental fairness" at trial. Id. at 193. Prejudice occurs in the context of a claim for ineffective assistance of counsel where "there is a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." Sistrunk v. Vaughn, 96 F.3d 666, 670 (3d Cir. 1996). Alternatively, the court may consider a procedurally defaulted claim if the petitioner can demonstrate that

failure to consider the claim will result in a fundamental miscarriage of justice. Coleman, 501 U.S. at 748. The "fundamental miscarriage of justice" exception is applicable only in extraordinary cases, such as "'where a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Werts, 228 F.3d at 193 (quoting Murray, 477 U.S. at 496). "'[A]ctual innocence' means factual innocence, not mere legal insufficiency." Bousley v. United States, 523 U.S. 614, 623 (1998). To establish such a claim, a petitioner must "support his allegations of constitutional error with new reliable evidence – whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence – that was not presented at trial." Schlup v. Delo, 513 U.S. 298, 321-22 (1995). Further, actual innocence "does not merely require a showing that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty." Id. at 329.

B. Standard of Review for Claims Addressed on the Merits

The Antiterrorism and Effective Death Penalty Act ("AEDPA"), which became effective on April 24, 1996, amended the standards for reviewing state court judgments in federal habeas petitions filed under 28 U.S.C. § 2254. Werts, 228 F.3d at 195. AEDPA increases the deference federal courts must give to the factual findings and legal determinations of the state courts. Id. at 196 (citing Dickerson v.

Vaughn, 90 F.3d 87, 90 (3d Cir. 1996)). Pursuant to 28 U.S.C. § 2254(d), as amended by AEDPA, a petition for habeas corpus may be granted only if (1) the state court's adjudication of the claim resulted in a decision contrary to, or involved an unreasonable application of, "clearly established Federal law, as determined by the Supreme Court of the United States;" or if (2) the adjudication resulted in a decision that was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). Factual issues determined by a state court are presumed to be correct and the petitioner bears the burden of rebutting this presumption by clear and convincing evidence. Werts, 228 F.3d at 196 (citing 28 U.S.C. § 2254(e)(1)).

The Supreme Court has further explained that "[u]nder the 'contrary to' clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." Williams v. Taylor, 529 U.S. 362, 412-13 (2000). Additionally, "[u]nder the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413. The "un

reasonable application" inquiry requires the habeas court to "ask whether the state court's application of clearly established federal law was objectively unreasonable." Id. at 409. "[A]n unreasonable application of federal law is different from an incorrect application of such law and a federal habeas court may not grant relief unless that court determines that a state court's incorrect or erroneous application of clearly established federal law was also unreasonable." Werts, 228 F.3d at 196 (citing Williams, 529 U.S. at 411).

C. Ineffective Assistance of Counsel

The Supreme Court set forth the standard for ineffective assistance of counsel in Strickland v. Washington, 466 U.S. 668 (1984). First a petitioner must show that counsel's performance fell below an objective standard of reasonableness, and second, a petitioner must show that he or she was actually prejudiced by counsel's deficient performance. Id. at 687-88. In determining reasonableness, because "it is too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable," a court must be "highly deferential" to counsel's performance and "indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." Id. at 689. In determining prejudice, "the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable

doubt respecting guilt." Id. at 695. With respect to claims of ineffective assistance of counsel for failing to raise or preserve claims, there can be no ineffective assistance of counsel based on an attorney's failure to raise a meritless claim. United States v. Sanders, 165 F.3d 248, 253 (3d Cir. 1999).

III. DISCUSSION

The Magistrate Judge recommends finding that Diggs's claims have been procedurally defaulted or should be denied because they lack merit. The claims, and their corresponding objections are addressed in turn.

A. Denial of Right to Effective Assistance of Counsel When the State Court Failed to Colloquy Petitioner About His Wish to be Represented by Counsel, and Layered Ineffectiveness of Counsel in this Regard

In his federal habeas petition, Diggs first contends that the state courts violated his due process and equal protection rights by failing to colloquy him about his wish to be represented by counsel on post-verdict motions and after the denial of his PCRA petition, thereby denying his right to effective assistance of counsel. Diggs also raises a layered claim of ineffective assistance of counsel for failing to raise and preserve the underlying denial-of-counsel claim.

The Pennsylvania Superior Court addressed these two claims on PCRA review and found that (1) Diggs waived his claim of trial court error for failing to make an on-the-record determination of the voluntariness of his waiver of counsel at the post-trial motions hearing because he could have raised the issue on direct appeal but failed to do so; and (2) his claim of ineffective assistance of counsel for failing to raise the issue on appeal was without merit because Diggs could not demonstrate that he suffered actual prejudice as a result of the Judge Stout's failure to conduct a colloquy. PCRA Appeal Opinion at 5-7.

The Magistrate Judge recommends finding that the claim of trial court error is procedurally defaulted by operation of the independent and adequate state ground doctrine. The independent and adequate state law doctrine applies because requirements that claims of trial error be raised on direct appeal is "firmly established and regularly followed." See Riley v. Lavan, Civ. A. No. 04-2577, 2005 WL 1995462 (E.D. Pa. Aug. 16, 2005). The Magistrate Judge also recommends finding that Diggs has not established cause or actual prejudice, nor made a showing of actual innocence in order to excuse his procedural default. According to the Magistrate Judge, and as discussed infra, Diggs's claim of ineffective assistance of counsel does not excuse his default because the ineffective assistance of counsel claim is without merit. The Magistrate also notes that any claim relating to ineffective assis-

tance of counsel during the PCRA phase of his appeals, is without merit as there is no federal constitutional right to the assistance of counsel on collateral appeal. See 28 U.S.C. § 2254(i). Having reviewed Diggs's objections, we find them to be meritless.

1. **Failure to conduct a colloquy**

Diggs argues in his pro se objections that the Magistrate Judge is blaming him for the trial court's failure to conduct a colloquy, that the failure to conduct a colloquy caused him prejudice, and that the failure to conduct a colloquy has resulted in new trials in other cases. (Pro se Objections at 3-4.) In his counseled objections, Diggs raises two arguments asserting that his claim of trial court error for failing to conduct a colloquy is not procedurally defaulted as recommended by the Magistrate Judge. First, counsel asserts that the Magistrate Judge found this claim to be procedurally defaulted because Diggs failed to include it on his 1925(b) statement, and that the procedural rule regarding 1925(b) statements was not an independent and adequate state ground because it was not firmly established at the time he filed his appeal. Second, counsel argues that Diggs nevertheless did raise this claim in his appellate briefs. (Counseled Objections at 9-28.)

Contrary to Petitioner's assertion, nothing in the Magistrate Judge's Report and Recommendation can be read to imply that Petitioner is faulted for the

failure to conduct the colloquy. Contrary to counsel's assertion, the Magistrate Judge did not rely on a failure by Diggs to include this issue on a 1925(b) statement. Rather, the Magistrate Judge relied on the fact that the Superior Court, on collateral review, found that this issue had been waived because Diggs "could have raised the issue on direct appeal but failed to do so." PCRA Appeal Opinion at 5. In fact, the Magistrate Judge specifically noted that the Superior Court did not find this issue waived because Diggs omitted the issue from a pro se statement of matters complained of on appeal. Because the Magistrate Judge did not base his recommendation on the Rule 1925(b) issue, this objection is overruled.

As for counsel's argument that Diggs did raise this issue in his direct appeal, he does not point to any place in the record where this underlying claim was raised in the direct appellate briefs. Rather, he only makes a bald assertion that this claim was raised previously. Having requested and received from the District Attorney a copy of Diggs's direct appellate briefs, both counseled and pro se, we find that there is no reference to a claim of trial court error for failing to conduct an on the record colloquy regarding Diggs's desire to proceed without counsel in either appellate brief. Consequently, this objection is overruled and we adopt the Magistrate's recommendation that this claim is procedurally defaulted.

With respect to Diggs's claim that there is "cause and prejudice" to excuse his procedural default because appellate counsel was ineffective by failing to raise and preserve this issue, as discussed, infra, Diggs's ineffective assistance of counsel claim has no merit. Therefore, his claim of ineffective assistance of counsel cannot excuse his procedural default.

Finally, Diggs asserts that he has made a showing of actual innocence because he has steadfastly maintained that he was not involved in this crime and had no knowledge of its existence, and because he asserted an alibi in all prior proceedings. Diggs has not come forward with any new reliable evidence that was not presented at trial. Therefore, we find that Diggs has failed to make a showing of actual innocence and that the fundamental miscarriage of justice cannot excuse his procedural default of this claim.

2. Ineffective Assistance of Counsel for Failing to Raise or Preserve Claim for Failing to Conduct a Colloquy

Diggs's layered claim of ineffective assistance of counsel for failing to raise and preserve this claim of trial court error is governed by applying the AEDPA review standard to the controlling Supreme Court law on ineffective assistance, Strickland v. Washington, 466 U.S. 668 (1984).

The Pennsylvania Superior Court denied this ineffectiveness of counsel claim on the grounds that Diggs failed to show how he was prejudiced by appellate counsel's failure to raise and preserve the claim on direct appeal. PCRA Appeal Opinion at 5-7. The Magistrate Judge similarly found that Diggs was not prejudiced by appellate counsel's failure to raise and preserve this claim because: (1) at his post-verdict motion hearing, Judge Stout appointed an attorney, but Diggs stated he was unhappy with the appointment and proceeded to represent himself; (2) Diggs did not argue or suggest during the hearing that he wished to be represented by counsel, nor is there any indication that he wished to raise additional claims; and (3) though Diggs argues that the absence of a colloquy about the potential risks of proceeding pro se cost him "important rights and advantages," Diggs does not explain what these rights and advantages may have been, he does not explain what Judge Stout should have told him that he did not already know, and he presents no evidence indicating that he would have declined to proceed pro se if the court had given the colloquy. (Report and Recommendation 18-19.)

We agree that the Superior Court's prejudice determination was not contrary to nor an unreasonable application of Strickland. In his pro se Objections, Diggs re-asserts that he was prejudice by the Judge Stout's failure to conduct a colloquy regarding his waiver of counsel because he "was in no position to

know what rights or issues he [was] abandoning." In his counseled Objections, Diggs asserts that he would not have proceeded without counsel had he been properly advised, and he would not have waived raising the issue regarding the dying declaration instruction, discussed infra, if he had realized its legal viability. Additionally, counsel asserts that post trial counsel would have raised additional issues at the post-trial motions hearing.

Diggs's objections on this claim are overruled. The only issue identified by Diggs that he claims would not have been waived had he been properly advised regarding the risks of proceeding without counsel is the claim of error in the jury instructions on dying declarations. However, the Superior Court in its memorandum addressing Diggs's direct appeal only noted that the following two claims were waived because he had failed to raise them in his post-trial motions: (1) a claim for ineffective assistance of counsel for failing to request a cautionary instruction with respect to the introduction of other crimes evidence, and (2) ineffective assistance of counsel for failing to use a statement to impeach Commonwealth witness Ricardo Kelsey. Nevertheless, the Superior Court addressed these two issues on the merits and found them to be meritless. See Commonwealth v. Diggs, No. 3664 Philadelphia 1994, at 8-9. Thus, Diggs was not prejudiced by his failure to raise any issue during his post-trial hearing. Diggs's claim that he was prejudiced because he would not

have waived his claim regarding the jury instruction concerning the dying declaration is unavailing because no court found that this claim was waived as a result of his failure to raise it at the post-trial hearing. Rather, the Superior Court, in its opinion affirming the PCRA court's denial of Diggs's PCRA petition, found this claim to be waived because Diggs failed to raise the issue on direct appeal. See PCRA Appeal Opinion at 15. Consequently, Diggs has not demonstrated any prejudice by his appellate counsel's failure to raise and preserve this issue. Because this claim for ineffective assistance of counsel is without merit, it cannot excuse Diggs's procedural default of his claim of trial court error in failing to conduct a colloquy.

B. Trial Court Error in Instructing the Jury that Impending Death Provides the Assurance of Truthfulness, and Layered Ineffectiveness of Counsel for Failing to Raise and Preserve This Claim

Diggs's next claim pertains the Judge Stout's instructions to the jury regarding dying declarations. Diggs assert that the trial court violated his constitutional rights by erroneously instructing the jury that impending death provides the assurance of truthfulness, and that trial counsel and appellate counsel were ineffective for failing to preserve the claim on appeal. The Superior Court addressed these claims in the PCRA Appeal Opinion. The Superior

Court found that the claim of trial court error in the jury instructions regarding dying declarations was waived because Diggs failed to raise this claim on direct appeal. The Superior Court also found that the ineffective assistance of counsel claim was waived because Diggs failed to raise this issue in his 1925(b) statement. Id.

Because of the state court finding of waiver, the Magistrate Judge found that the claim of trial court error was procedurally defaulted, and that the alleged ineffectiveness of counsel claim cannot constitute "cause" for the default because Diggs failed to properly present the claim to the state court independently and prior to its use to establish cause. (Report and Recommendation at 20-21.) The Magistrate Judge also noted that if he were to reach the merits of this claim, he would find it to be meritless because Judge Stout's instructions property set forth the Pennsylvania law on dying declarations. (Id. at 21 n.11.) Therefore, the Magistrate Judge noted that there was no constitutional violation on the basis of erroneous jury instructions and no ineffective assistance of counsel for failing to preserve this claim.

Diggs objects that waiver of a claim due to failure to include it in a 1925(b) statement is not an independent and adequate state ground upon which we can find a claim to be procedurally defaulted because this procedural rule was not firmly established at the time of his appeal. (Counseled Objections at 35.) This objection is overruled. First, the Superior Court

only found that the layered claim of ineffective assistance of counsel for failing to raise the issue of an error in the jury instruction was waived for failing to include it in the 1925(b). The Superior Court found that the underlying claim was waived because it could have been raised on direct appeal, but was not. Thus, Diggs's objection only applies to the Magistrate Judge's recommendation regarding the ineffective assistance of counsel, and not the underlying claim of error in the jury instructions. Second, the rule that an issue is waived if it is not raised in the 1925(b) statement was definitively established at least as early as October 1998. See Commonwealth v. Lord, 719 A.2d 306, 308 (Pa. 1998); see also Commonwealth v. Butler, 812 A.2d 631, 633 (Pa. 2002) (holding that Lord "eliminated any aspect of discretion and established a bright-line rule for waiver under Rule 1925"). Diggs's procedural default for failing to include this claim of ineffective assistance of counsel occurred in early 2002, following the February 6, 2002 order by the PCRA court directing Diggs to file a concise statement of matters complained of on appeal. Therefore, the procedural rule relied upon by the state in finding that Diggs had waived this claim was firmly established at the time of Diggs's default and Diggs objection is overruled.

C. Ineffectiveness of Appellate Counsel for Failing to Raise Ineffectiveness of Trial Counsel for Not Objecting to Prosecutor's Questioning of a Prosecution Witness Regarding the Witness's Past Criminal History

Diggs asserts in his habeas petition that appellate counsel was ineffective for failing to raise the ineffectiveness of trial counsel for failing to object to prosecutor's questioning of Ricardo Kelsey, Detective Thompson, and Detective Devlin. According to Diggs, Kelsey, a witness for the prosecution, testified that he entered into a plea agreement in which he agreed to plead guilty to the murders of Leroy Jackson, Jr. and Denise Walters, and to testify that Diggs confessed to murdering his victim, in exchange for a recommendation of a lesser sentence. Additionally, the prosecution read into evidence testimony from Detective Thompson in which he testified that he knew Diggs, prior to the instant murder, in his capacity as a homicide detective. The prosecutor also questioned Devlin about his knowledge of the double murders. Diggs asserts that the combined testimony of Kelsey, Devlin, and Thompson implicated him in the double-murder for which Kelsey pled guilty, and that counsel failed to object, seek a curative instruction, or request a mistrial.

The Superior Court addressed on the PCRA appeal the merits of Diggs's claim that appellate counsel was ineffective for failing to raise on direct appeal the issue of whether trial counsel was ineffective for failing to object to the prosecutor's questioning of Ricardo Kelsey regarding his negotiated plea to unrelated murder charges. See PCRA Appeal Opinion at 8 10. The Superior Court found Diggs's claim regarding the questioning of Kelsey to be without merit because Kelsey never testified that Diggs participated in the murders of Mr. Jackson and Ms. Walters, and there was no indication that Kelsey's testimony created such an inference. The Superior Court found that it was proper for the prosecutor to question Kelsey on this matter, as this questioning was in anticipation of an attack on Kelsey's credibility by the defense. The Superior Court, therefore, concluded that trial counsel was not ineffective for failing to object, and appellate counsel was not ineffective in failing to raise the issue on direct appeal.

Also on the PCRA appeal, the Superior Court addressed in a footnote Diggs's claim regarding the b questioning of Detective Devlin. The Superior Court stated that "[Diggs] also argues that the Commonwealth should not have questioned Detective Martin Devlin about whether he was aware of any of the facts surrounding the Jackson/Walters murders before he spoke to Mr. Kelsey, and that prior counsel was ineffective with regard thereto." The Superior Court found that this issue was waived because it

was not listed in Diggs's court-ordered 1925(b) statement. Alternatively, the Superior Court found that Diggs's claim of ineffective assistance of counsel was meritless because trial counsel did in fact object to the Commonwealth's questioning of Detective Devlin. PCRA Appeal Opinion at 10 n.14.[3]

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[3] In the PCRA appeal, the Superior Court did 3 not address the layered claim pertaining to whether appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to object to testimony from Detective Thompson regarding his prior familiarity with Diggs in his capacity as a homicide detective. A review of the briefs filed by Diggs reveals that, while he raised the claim involving Kelsey and Devlin, he never raised an issue involving the testimony of Thompson in the PCRA appeal. See Appellant's Brief for the Superior Court filed Nov. 1, 2004; Appellant's Brief for the Superior Court dated December 1, 2004.

This claim was, however, actually raised by Diggs's appellate counsel on direct appeal. (See Docket No. 31, "Brief for Appellant appealing the judgment of sentence imposed by the court of Common Pleas of Philadelphia County on September 7, 1994, at Nos. 2079 2081, July Term, 1974" at 12, 37-40.) The Superior Court addressed the claim and found it to be meritless.

Diggs's failure to raise appellate counsel's ineffectiveness vis-a-vis Thompson in the PCRA appeal renders the issue procedurally defaulted. As appellate counsel cannot

The Magistrate Judge recommends that the Superior Court's reasoning with respect to the claim regarding testimony by Kelsey was not contrary to or an unreasonable application of, the standard set forth by the Supreme Court in Strickland because it is proper and commonplace for prosecutors to elicit damaging information on direct examination, rather than allow defense counsel to undermine the credibility of a prosecution witness. He concludes that, as trial counsel could not be faulted for failing to object to a proper line of questioning, appellate counsel was not constitutionally ineffective for failing to raise this claim on appeal.

Diggs objects to this portion of the Report and Recommendation by asserting that, a careful reading of Kelsey's testimony, focusing on how the prosecutor switched back and forth between questions about the double murders and the murder in this case, established that a reasonable jury would infer that Diggs was involved in the double murder. (Pro Se Objections at 8-9.) Our own careful review of Kelsey's testimony demonstrates that the reasoning of the state court is not contrary to nor an unreasonable application of the standard set forth in Strickland. Kelsey never testified that Diggs was involved in the double

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have been ineffective for failing to raise an issue that he in fact did raise, the issue also is meritless.

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murders of Jackson and Walters, and, contrary to Diggs's assertion, there is simply no indication that Kelsey's testimony created such an inference. The prosecutor, after establishing that Kelsey committed the double murder, and that he admitted that crime to the officers when they asked him about Diggs, focused solely thereafter on Kelsey's knowledge of Diggs's involvement in the murder of Linda DeBose. (N.T. 10/22/91 at 195:4-207:5.) Accordingly, we overrule the objection as regards Kelsey's testimony.

Diggs also objects to the Magistrate Judge's Report on the grounds that his claim with regard to Detective Devlin was not addressed. The claim relating to Devlin's testimony was found to be waived by the Superior Court because it was not listed in Diggs's 1925(b) statement. This failure constitutes an independent and adequate state ground upon which to find this claim procedurally defaulted. However, the Superior Court, in the alternative, found that this claim lacked merit because trial counsel did in fact object to the Commonwealth's questioning of Devlin. Applying the deferential AEDPA standard, we find that the state court's adjudication of this claim was not contrary to or unreasonable application of the Strickland standard for ineffective assistance of counsel. Accordingly, we overrule Diggs's objections regarding the Devlin testimony.

D. Trial Court Error in Instructing the Jury on Accomplice Liability, Conspiracy and Specific Intent, and Ineffectiveness of Appellate Counsel for Failing to Raise Ineffectiveness of Trial Counsel in This Regard

Diggs asserts in his petition that the trial court erred in instructing the jury on accomplice liability, conspiracy, and specific intent, and that appellate counsel was ineffective for failing to raise a claim of ineffectiveness of trial counsel for not challenging these jury instructions. Diggs specifically contends that the trial court's charge did not adequately inform the jury that an accomplice must share the specific intent to kill with the active partner in order to be convicted of first degree murder, and the court improperly instructed the jury regarding specific intent.

The Superior Court addressed this claim on collateral appeal. See PCRA Appeal Opinion at 10. It found that the underlying claim was waived because it could have been raised on direct appeal, but was not. The Superior Court also found that the layered ineffectiveness claim failed because the underlying claim was meritless as the jury charge, when reviewed as a whole clearly, adequately, and accurately reflected the law.

With respect to the claim pertaining to accomplice liability, the Superior Court found that the jury in-

structions adequately informed the jury that an accomplice must share the specific intent to kill with the active partner in order to be convicted of first degree murder. The Superior Court pointed to the following portion of the jury instruction: "To aid and abet in the commission of a crime, one must possess a shared intent to commit it." Id. at 11. The Superior Court also noted that in response to the jury's request for clarification, the trial court stated, among other things, that "[a] person is really accountable for the conduct of another person when he is an accomplice of such other person in the commission of the offense. To aid and abet in the commission of a crime, one must possess a shared intent to commit it. One is an aider and abettor in the commission of a crime, that is he had joined in the commission, if he was an active partner in the intent which was the crime's basic element." Id. at 11-12.

With respect to the jury instructions pertaining to first degree murder, the Superior Court noted that the trial judge at first incorrectly stated that "[a] criminal homicide constitutes murder of the first degree when it is committed by an unintentional killing." As noted by the Superior Court, the trial judge continued by stating that, "As used in this statute, intentional killing means, among other things, any willful, deliberate and premeditated killing." The trial judge further instructed: "In determining whether or not the defendant committed the kind of intentional killing required for first degree murder,

you should consider the testimony of . . . . If the defendant intentionally used a deadly weapon on a vital part of the victim's body, you may infer from that the killing was intentional." In response to a request for clarification, the trial court stated, among other things, the following regarding first degree murder: "Now a definition of murder in the first degree. A criminal homicide constitutes murder in the first degree when it is committed by an intentional killing. . . ." The Superior Court held that while the trial court erred in initially stating that murder in the first degree is an unintentional killing, it concluded that this error was harmless because the trial judge on numerous subsequent occasions informed the jury that first degree murder required an intentional killing. Id. at 14 n. 15. The Superior Court concluded that the jury instruction, in total, was not confusing and adequately informed the jury that an accomplice must also share the specific intent to kill with the active partner to be convicted of first-degree murder.

With respect to the jury instruction pertaining to conspiracy, the Superior Court noted that the trial judge stated:

> Where two or more join in the commission of an unjustified assault which results fatally, all are guilty, regardless of which one inflicts the mortal wound.
>
> Where two or more combine to make an assault, and in carrying out such common

> purpose another is killed, the one who enters into the combination but does not personally commit the wrongful act is equally responsible for the homicide as the one who directly causes it.
>
> Conspiracy is not synonymous with aiding and abetting. Conspiracy requires an agreement to commit a crime, plus an overt act.

Id. at 14. The Superior Court found that the trial court's instructions with respect to the crime of conspiracy were proper under state law.

The Magistrate Judge recommends finding that the jury charge with respect to accomplice liability, conspiracy, and first degree murder were entirely appropriate under state law, and the claim for ineffective assistance of appellate counsel for failing to raise trial court error is thus without merit. The Magistrate rejected Diggs's challenge to the charge on accomplice liability, based on Everett v. Beard, 290 F.3d 500 (3d Cir. 2002), in which the United States Court of Appeals for the Third Circuit found an accomplice liability jury instruction to be flawed where Everett was the getaway driver in the robbery of a grocery store in which the robbers murdered two people during the robbery. Diggs reasserts his argument as an objection to the Report and Recommendation.

We find that the trial judge's instructions regarding the need of the accomplice to share the specific intent were conclusively determined by the Superior Court to be appropriate under state law, vitiating any federal constitutional claim of ineffective assistance in the failure of counsel to object thereto, and accordingly, overrule Diggs's objection. The Superior Court also rejected as a matter of state law Diggs's argument that the conspiracy instructions were flawed because a jury could have convicted him of conspiracy on the theory that the only crime he agreed to commit was "a simple assault on the victim", and believed that this was sufficient to find him guilty of first-degree murder. Finally, the Superior Court determined that the trial judge's mistaken utterance of "unintentional," rather than "intentional," when initially giving the first-degree murder instruction was adequately corrected by her in subsequent instructions and when the jury asked for clarification on the issue.

In assessing the merits of this claim, the Superior Court did not apply a rule of law that contradicted or unreasonably applied the applicable Supreme Court precedent on the review of jury instructions. See Estelle v. McGuire 502 U.S. 62, 72 (1991) (holding that jury instructions must be read as a whole and in context; an erroneous jury instruction can rise to the level of a constitutional violation only if it "so infected the entire trial that the resulting conviction violates due process"). Rather the Superior Court

looked at the jury instructions as a whole and determined that they clearly and accurately indicated to the jury that, to find Diggs guilty of murder in the first degree, it was necessary that they find he possessed the requisite specific intent to kill.[4] The Superior Court also reviewed the jury instructions regarding conspiracy as a whole and concluded that the challenged portions of the jury instructions accurately conveyed the state law elements of conspiracy because the jury was informed that, to convict a defendant of conspiracy, a trier of fact must find that: (1) the defendant intended to commit or aid in the commission of the criminal act; (2) the defendant entered into an agreement with another to engage in the crime; and (3) the defendant or one or more of the other co-conspirators committed an overt act in furtherance of the agreed upon crime. Commonwealth v. Murphy, 844 A.2d 1228, 1238 (Pa. 2004). Consequently, as the underlying claim of jury instruction error is without merit, Diggs's layered

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[4] Diggs's reliance on Everett v. Beard, 290 F.3d 4 500 (3d Cir. 2002) is misplaced. In Everett, the state court had explicitly permitted the jury to impute to the defendant the murderer's intent to kill. In the instant case, the trial judge informed the jury that "to aid and abet in the commission of a crime, one must possess a shared intent to commit it."

claim for ineffective assistance of appellate counsel in failing to raise this claim is also without merit.

E. Double Jeopardy

Diggs asserts in his federal habeas petition that his double jeopardy rights were violated because he was tried four times for the same offense and specifically because his fourth trial occurred as a result of a federal court finding that the prosecutor's peremptory challenges in the third trial violated Batson v. Kentucky. On his direct appeal, the Superior Court noted that Diggs's double jeopardy claim was made pursuant to the Pennsylvania Constitution, and that he principally relied on Commonwealth v. Smith, 615 A.2d 321 (Pa. 1992). The Superior Court denied this claim. To the extent that Diggs asserts in his federal petition a claim that his double jeopardy rights pursuant to the Pennsylvania Constitution were violated, federal habeas relief is unavailable because federal habeas relief only concerns custody of individuals held in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). In order for Diggs's federal claim that his fourth trial violated the Double Jeopardy Clause of the federal constitution to be properly before us on federal habeas review, he must have exhausted this federal law claim in state court. Exhaustion requires that Diggs "fairly presented" the federal claim's factual and legal substance to the state courts in a manner that puts them on notice that a federal claim is being asserted. McCandless v. Vaughn, 172 F.3d

255, 261 (3d Cir. 1999). However, we need not determine whether Diggs exhausted this federal claim in the state courts because we may deny a claim on the merits, notwithstanding the failure of the petitioner to exhaust his state court remedies. 28 U.S.C. § 2254(b)(2).

Diggs's claim that his protections afforded by the Double Jeopardy Clause were violated by his fourth trial are without merit. The application of the double jeopardy bar requires a showing of the prosecutor's subjective intent to cause a mistrial in order to retry the case. See United States v. Williams, 472 F.3d 81, 85 (3d Cir. 2007); see also United States v. Coleman, 862 F.2d 455, 458 (3d Cir. 1988) (noting that the Double Jeopardy Clause will not bar retrial absent intent on the part of the prosecutor to subvert the clause's protections); United States v. Gilmore, 454 F.3d 725, 729-30 (7th Cir. 2006) ("The key question is whether the prosecutor deliberately introduced the error in order to provoke the defendant into moving for a mistrial, and thereby rescuing a trial going badly. . . . Intent is a critical element to understand when determining if a prosecutor's actions intentionally triggered the mistrial.") There is no evidence that the prosecutor in Diggs's third trial – his first trial to result in a verdict – deliberately intended to cause a mistrial when he violated Batson. Rather, it is clear that the prosecutor intended to, and in fact did, obtain a conviction. The discovery of the Jack McMahon tapes does not make Diggs's claim merito-

rious. The McMahon tapes provided information on techniques that supposedly increased chances of obtaining a conviction. Thus, their discovery does not provide evidence that the prosecutor in Diggs's third trial intentionally sought to cause a mistrial.

F. Ineffectiveness of Appellate Counsel for Failing to Assert Trial Counsel's Ineffectiveness for Failing to Introduce Petitioner's Alibi Defense

Diggs claims that his appellate counsel was ineffective for failing to assert on direct appeal trial counsel's ineffectiveness regarding Diggs's alibi. Diggs asserts that he was in Harrisburg, Pennsylvania, at the time the victim was murdered in Philadelphia. Diggs asserts that he told trial counsel of his alibi and gave trial counsel the names and last known addresses of witnesses who could have verified his alibi.

In addressing this claim on the PCRA appeal, the Superior Court found:

> Defense counsel testified that [Petitioner] told him that he was in Harrisburg, Pennsylvania, and that various witnesses would verify this fact. N.T. 2/28/94 at 20- 21. However, defense counsel further testified that he was unable to locate any of the witnesses and could not find anyone who would verify that [Petitioner] was in Harrisburg, Penn

> sylvania when Ms. DeBose was murdered. N.T. 2/28/94 at 21. Defense counsel indicated that he was concerned that if he specifically asked [Petitioner] where he was when Ms. DeBose was murdered the Commonwealth would ask [Petitioner] on cross-examination who he was with and why the witnesses were not testifying. N.T. 2/28/94 at 22. During trial defense counsel specifically asked [Petitioner] if he killed Ms. DeBose, to which [Petitioner] replied negatively, and defense counsel elicited testimony from [Petitioner] that [he] called his wife from Harrisburg, Pennsylvania, the morning after the murder N.T. 10/23/91 at 340-341.
>
> Based on the aforementioned, we conclude defense counsel had a reasonable, strategic basis for not specifically asking [Petitioner] if he was in Harrisburg, Pennsylvania, when Ms. DeBose was murdered, and, therefore, [Petitioner's] layered ineffective assistance of counsel claim fails.

PCRA Appeal Opinion at 16.

The Magistrate Judge found that the state court's reasoning regarding this claim for ineffectiveness was not contrary to nor an unreasonable application of Strickland. The Magistrate Judge concluded that the decision of trial counsel not to ask Diggs about

his alibi was clearly a matter of trial strategy, especially due to the fact that counsel had been unsuccessful in locating the allegedly corroborating witnesses, and that questioning Diggs on his alibi would subject him to damaging cross-examination about why there were no corroborating witnesses. As trial counsel performance cannot be considered deficient for failing to introduce Diggs's alibi defense, appellate counsel cannot be faulted for failing to raise this issue on appeal.

In his objections, Diggs reasserts that trial counsel was ineffective for failing to ask him about his alibi. Diggs also now contends in his objections that trial counsel never did anything other than mail a letter to the address of the alibi witness, and that "trial counsel never made any efforts to ascertain possible testimony and bringing (sic) these witnesses to court." (Pro se Objections at 13). We overrule his objections.

The state court's adjudication of Diggs's claim that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness for failing to question him about his alibi defense was not contrary to nor an unreasonable application of Supreme Court precedent. The trial attorney's decision not to ask Diggs to testify about his alibi was clearly a matter of trial strategy given that counsel had been unsuccessful in locating any alleged alibi witnesses, and questioning Diggs on his alibi would have caused him to be subjected to damaging cross-examination

regarding why no alibi witnesses had testified on his behalf. Diggs's claim that trial counsel made insufficient efforts to locate his alleged alibi witnesses has not been presented previously to the state courts. Consequently, an ineffectiveness claim on this basis is unexhausted and procedurally defaulted, with no basis in the record to excuse said default.

G. Trial Court Error in Failing to Provide Petitioner with Voir Dire Transcripts

Diggs asserts that the trial court violated his constitutional rights by failing to provide him with transcripts from the voir dire. Diggs raised this claim in his PCRA appeal, and the Superior Court found this claim to be waived because he could have raised it on direct appeal but failed to do so. Diggs asserts that he did file a motion to have the voir dire testimony transcribed and that the court ignored his request, but he makes no citation to the record of such a request. In order to overcome the procedural default of this claim of trial court error, Diggs must demonstrate cause and prejudice or show that the failure to review this claim would be fundamentally unfair.

To establish cause, Diggs asserts that appellate counsel was ineffective for failing to raise trial counsel's ineffectiveness in failing to obtain the voir dire transcripts. The Superior Court addressed the validity of this claim and found it to be meritless. It noted that Diggs asserted that "[i]f appellate counsel had read the docket entries and reviewed [the] pro se

pet[i]tion's (sic) that were filed with the clerk in [the] lower court, he would have seen the probability that there might just be something to appellant's motions and allegations. He missed the mark." PCRA Appeal Opinion (quoting Appellant' Brief at 56). The Superior Court found that this bald assertion that appellate counsel was ineffective was insufficient to overcome the presumption that counsel is competent. The Superior Court also noted that Diggs did not develop any specific argument concerning trial counsel's effectiveness. Id. at 17 n.18.

In his habeas brief, Diggs asserts that the Superior Court's conclusion that his allegations of appellate counsel ineffectiveness were insufficient was "just plain error" because counsel was clearly ineffective given that petitioner had raised a Batson challenge, the District Attorney's Office may have had a policy of striking African Americans at the time of Diggs's trial, and petitioner had just been retried after a Batson violation in a prior trial. The Magistrate Judge recommends finding that the claim of trial counsel ineffectiveness claim has no merit, and thus cannot serve to excuse his procedural default of the underlying claim of trial court error. Alternatively, the Magistrate Judge recommends finding that the underlying claim of trial court error is meritless. In his Objections, Diggs repeats the arguments contained in his habeas petition.

We find that the Superior Court's denial of the claim of ineffectiveness of appellate counsel was not

contrary to nor an unreasonable application of established Supreme Court precedent and thus we overrule Diggs's objections. Under Strickland, a court must be "highly deferential" to counsel's decisions and there is a "strong presumption" that counsel's performance was reasonable. Strickland, 466 U.S. at 689. Diggs's only basis for ineffective assistance of counsel is his assertion that, if appellate counsel had read the docket and his pro se petitions, he would have seen that there was a possible Batson violation. Without more, it is not an unreasonable application of Supreme Court precedent for the state court to have found that Diggs failed to overcome the strong presumption that counsel was competent. Moreover, it is more reasonable to conclude that appellate counsel choose to spend his efforts on non-Batson claims given that trial counsel – who, as we discuss infra, was intimately familiar with Batson due to the fact that he successfully obtained a new trial for Diggs on the basis of a Batson violation – clearly did not believe there was a viable Batson claim in the second full trial. As his claim for ineffective assistance of appellate counsel is without merit, it cannot excuse his procedural default of the underlying claim of trial court error.

H. Prosecutorial Misconduct in Improperly Excluding Black Venirepersons in Violation of *Batson*

In a related claim, Diggs alleges prosecutorial misconduct in improperly excluding young black venire

persons in violation of Batson. The Superior Court, on PCRA appeal, addressed this claim and found it to be waived because Diggs could have raised it at trial – when the African-American members of the venire were peremptorily struck – as well as on direct appeal, but did not. The Superior Court, nevertheless, addressed the merits of the claim because Diggs also included a layered ineffectiveness of counsel claim for failing to raise or preserve this issue, finding that the Batson claim had no merit because Diggs was not able to show with the evidence he proffered at the post-conviction stage, any actual, purposeful discrimination by the prosecutor.[5]

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[5] Notably, the Superior Court did not apply the three-step process described in Batson, but rather relied on Commonwealth v. Uderra, 862 A.2d 74 (Pa. 2004) which relied on McCrory v. Henderson, 82 F.3d 1243 (2d Cir. 1996) (holding that, on collateral review, the three-step Batson process is not to be utilized; it is only appropriate to adjudicate contemporaneous objections during the voir dire, where the prosecutor can state his non-discriminatory reasons before the jury is empaneled). Uderra held that a post-conviction petitioner may not rely on a prima facie case under Batson, but must prove actual, purposeful discrimination by a preponderance of the evidence in addition to all other requirements essential to overcome the waiver of an underlying Batson claim. Uderra, 862 A.2d at 87. Diggs contends in his habeas brief that the Superior Court's reasoning used to find that the underlying

The Magistrate Judge found that the underlying substantive Batson violation was procedurally defaulted because it was not raised during the voir dire or on direct appeal, a fact the Magistrate Judge found particularly revealing since trial counsel was the same attorney that successfully argued the Batson violation leading to the granting of the new trial. In his counseled Objections, Diggs objects to the procedural default recommendation, citing Brinson v. Vaughn, 398 F.3d 225 (3d Cir. 2005).[6] (Counseled

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Batson claim had no merit and, consequently, to deny his ineffective assistance of appellate counsel claim, was contrary to and/or an unreasonable application of Supreme Court precedent because the Superior Court required Diggs to meet a threshold higher than the prima facie standard established in Batson. The United States Court of Appeal for the Third Circuit has never spoken on the holding of McCrory, and continues to consider non-contemporaneously raised Batson violations under the three-step process. See, e.g., Hardcastle v. Horn, 368 F.3d 246 (3d Cir. 2004). Because we agree with the Magistrate Judge that the issue was procedurally defaulted, we do not reach the issue of whether the Superior Court's citation to McCrory, as authority that the three-step Batson process is not to be utilized on collateral review, was contrary to or an unreasonable application of Supreme Court law.

[6] In his pro se Objections, Diggs does not address the procedural default issue.

Objections at unnumbered page 20-21.) We overrule this objection. The holding of Brinson is inapposite to the issue of procedural default. See id. at 227 n.2 (noting that the state courts did not hold, and the Commonwealth did not contend on appeal, that Brinson procedurally defaulted his Batson claim by failing to raise an objection at the time when the challenges were exercised). We also find that the default cannot be excused because, under Strickland, counsel's failure to object was entitled to a presumption of validity, and Diggs's unsupported assertion that counsel should have objected is insufficient to overcome the presumption.

I. Violation of Due Process for Excluding Evidence of the Acquittal of Petitioner's Accomplice, and Layered Ineffectiveness of Counsel for Failing to Raise and Preserve This Claim

Diggs asserts that his due process rights were violated when the trial court excluded evidence of the acquittal of Petitioner's accomplice, Alfred Clark; that trial counsel was ineffective for failing to object in this regard; and that appellate counsel was ineffective for failing to preserve this claim on appeal. Specifically, Diggs asserts that the prosecutor was permitted to convey to the jury that Alfred Clark participated in the crime for which Diggs was on

trial, even though the prosecution knew that Clark has been acquitted, and that Diggs was not able to correct the misrepresentation by the prosecutor by presenting evidence of Clark's acquittal. Diggs asserts that his request to introduce the evidence of Clark's acquittal was made "solely in response to the prosecutor's repeated and continued deception inferring to the jury that Clark was one of the perpetrator's in [Linda] DeBose's death." (Pet.'s Br. at 104.) Diggs contends that the prosecutor insistently argued Clark's guilt to the jury as a vital and indispensable part of his theory of the case, knowing this assertion to be false.

The Superior Court addressed the issue of trial court error in excluding evidence of Clark's acquittal. The Superior Court found that this issue was waived because it could have been raised on direct appeal but Diggs failed to do so. Because Diggs raised a layered ineffective assistance of counsel claim, the Superior Court proceeded to address the claim on the merits and found that there was no trial error under Pennsylvania evidence law. The Superior Court did not address a due process claim. The Magistrate recommends finding that: 1) the due process claim is procedurally defaulted by operation of the independent and adequate state ground doctrine; and 2) the ineffective assistance claim is without merit and thus cannot serve as cause to excuse the default. In his Objections, Diggs repeats the allegations contained in his petition.

We overrule Diggs's objections. The Superior Court's determination that the underlying claim of trial court error was without merit vitiates Diggs's claim of ineffective assistance as a basis for excusing his procedural default. Diggs's has no basis to show ineffective assistance of counsel given the clear Pennsylvania rule of evidence precluding the type of evidence to which counsel failed to object. See Commonwealth v. Holloway, 739 A.2d 1039, 1044 (Pa. 1999) (holding that no evidence of another's acquittal may be introduced to create an impression before the jury that the defendant is equally innocent). Diggs's counsel could not have been ineffective for not attempting to have this evidence admitted or for failing to raise an objection. Because, under Strickland, counsel cannot be ineffective for failing to raise a meritless claim, Diggs is not entitled to relief based on his layered claim of ineffective assistance of counsel for failing to raise trial court error.[7]

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[7] Assuming arguendo that Diggs did fairly present his federal due process claim to the state court and the state court did not adjudicate this claim on the merits, we find that this claim is without merit. The Supreme Court has been traditionally reluctant to "impose constitutional constraints on ordinary evidentiary rulings by state trial courts." Crane v. Kentucky., 476 U.S. 683, 689 (1986). The Constitution gives trial judges "wide latitude" to exclude evidence that is "repetitive," "only marginally relevant," or that poses an undue risk of "harassment,

prejudice, or confusion of the issues." See Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). Further, the Court has "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability – even if the defendant would prefer to see the evidence admitted." Crane, 476 U.S. at 690 (citing Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Nonetheless, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." Crane, 476 U.S. at 690 (citations omitted). This right is abridged by evidence rules that "infringe[] upon a weighty interest of the accused" and are "'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" United States v. Scheffer, 523 U.S. 303, 308 (1998) (quoting Rock v. Arkansas, 483 U.S. 44, 58 (1987)).

In the instant situation, the evidentiary rule applied by the state court precludes a criminal defendant from presenting evidence of the acquittal of another person charged in connection with the same episode to create the impression before the jury that the defendant is equally innocent. See Commonwealth v. Meredith, 425 A.2d 334 (Pa. 1981) (stating that the admission of evidence of the fact that another jury concluded that another defendant had not committed the crime would not aid in the slightest the determination of the instant defendant's innocence or guilt.) The one exception to this rule is that a defendant may introduce evidence of another person's acquittal when that person testifies on behalf of the defendant and the acquittal is introduced for the limited purpose of removing the cloud of criminal charges over the witness. Commonwealth v. Holloway, 739 A.2d 1039,

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1044 (Pa. 1999). Here, the exception is inapplicable because a person acquitted did not testify on Diggs's behalf.

Under the Pennsylvania Rules of Evidence, a prosecutor would not be permitted to present evidence of a co-conspirator's conviction or guilty plea for the purpose of proving that the defendant was guilty. See Pennsylvania Rules of Evidence 404(b)(1). The fact that evidence of a coconspirator's conviction would not be admissible to show that the defendant is also guilty, demonstrates that the evidentiary rule precluding evidence of a co-conspirator's acquittal is not arbitrary. This conclusion is also bolstered by the fact that other courts apply a similar rule regarding the exclusion of evidence of a co-conspirator's acquittal. See United States v. Sanders, 95 F.3d 449, 454 (6th Cir. 1996); United States v. Fernandez-Roque, 703 F.2d 808, 813 (5th Cir. 1983). The fact that the prosecution's theory was that Diggs, Clark, and Riggins were co-conspirators and that the prosecutor made reference to this theory does not alter the conclusion that Diggs's due process rights were not violated by the exclusion of evidence of Clark's acquittal.

J. Violation of Due Process for Having to Wear Prison Clothes at Trial

Diggs asserts in his habeas petition that his due process rights were violated at trial because he was forced to stand trial wearing prison clothes. He also asserts a layered claim of ineffective assistance of counsel for failing to preserve this claim. The Superior Court found the substantive claim was waived because Diggs failed to raise it on direct appeal. The Superior Court then addressed the layered ineffective assistance of counsel claim and determined that Diggs was not entitled to relief because he failed to offer proof that the jury was aware that he was clothed, in part, in prison attire, and failed to establish that the clothing was marked or identified as prison attire.

The Magistrate Judge recommends finding that the underlying claim of trial court error is procedurally defaulted by operation of the independent and adequate state ground doctrine. The Magistrate Judge also recommends that the claim of ineffective assistance of counsel is without merit and thus cannot excuse Diggs's procedural default. The Magistrate Judge found that it was highly unlikely that the clothes Diggs was wearing during the first three days of trial were identifiable as prison-issue based on the fact that: 1) Judge Stout, responding to Diggs's complaint about his clothes during the trial, stated that she could not tell that Diggs's clothes were prison-issue garb; and 2) there was no evidence in the record to establish that any juror thought oth-

erwise. In his counseled Objections, Diggs asserts there is "no doubt" that his clothing was identifiable as prison garb. (Counseled Objections at unnumbered page 24.) We overrule the objection.

Whether the jury could tell that Diggs was wearing prison-issue clothing is a question of fact entitled to a presumption of correctness. Werts, 228 F.3d at 196. The trial judge, the person who was in the best position to evaluate Diggs's appearance, could not tell that he was wearing prison clothing. Counsel's unsupported assertion that there was "no doubt" that Diggs's clothing could be identified as prison garb does not rebut the presumption by clear and convincing evidence.

K. Trial Court Error in Sentencing and Layered Ineffectiveness of Counsel for Failing to Raise and Preserve this Claim

Diggs asserts in his habeas petition that the trial court erred in increasing the sentence after his re-trial, and that trial and appellate counsel were ineffective in failing to raise this claim. After Diggs's first conviction, he was sentence to life-imprisonment concurrent with another homicide conviction for which he was already serving a life sentence. After Diggs's successful appeal and following his re-trial, Diggs was sentenced by a different trial judge to life imprisonment to run consecutive to the life sentence he was already serving. Diggs as

serts that trial counsel was ineffective for failing to object to the harsher sentence imposed by the new trial judge following his successful appeal and re-trial, and that appellate counsel was ineffective for failing to preserve this claim. Furthermore, Diggs asserts that the only reason on which the new trial judge could have relied in order to justify increasing his sentence, was the fact that Diggs was arrested for a double murder. Diggs, however, was subsequently acquitted of charges associated with this double murder. Diggs asserts that the charges of the double murder should not have played a role in increasing his punishment.

The Superior Court addressed Diggs's claim of trial and appellate counsel ineffectiveness, and found these claims to be without merit because the underlying claim of sentencing error was meritless. The Superior Court identified the applicable Supreme Court precedent as North Carolina v. Pearce, 395 U.S. 711 (1969), in which the Court held that a sentencing court violates the Due Process Clause when it imposes a heavier sentence upon a reconvicted defendant for the purpose of penalizing the defendant for having successfully appealed from his original conviction. See id. at 723-24. As a prophylactic measure, the Court created a "presumption of vindictiveness which may be overcome only by objective information in the record justifying the increased sentence. United States v. Goodwin, 457 U.S. 368, 374 (1982). The Superior Court recognized

that Pearce and its progeny teaches that the Due Process Clause of the Fourteenth Amendment prevents an increased sentence when that increase was motivated by vindictiveness on the part of the sentencing judge, but held that "the Pearce requirements . . . do not apply in every case where a convicted defendant receives a higher sentence on retrial.'" PCRA Appeal Opinion at 22-23 (quoting Commonwealth v. Mikesell, 537 A.2d 1372, 1380 (Pa. Super. 1988) (quoting Texas v. McCullough, 475 U.S. 134, 138 (1986). The Superior Court, citing Mikesell, held that there was no presumption of vindictiveness when the judge who imposed the original sentence is different from the judge who imposed the new sentence following a successful appeal, and that, in the absence of such a presumption, the defendant must affirmatively prove actual vindictiveness. PCRA Appeal Opinion at 23 (quoting Mikesell at 1381); see also McCullough, 475 U.S. at 140 (holding that the Pearce presumption does not arise where "different sentencers assessed the varying sentences that [defendant] received"). Because Diggs had not set forth a case of actual vindictiveness, the Superior Court found that Diggs's claim has no merit.

The Magistrate Judge recommends finding that the reasoning of the state court is neither contrary to nor an unreasonable application of the Supreme Court law in Pearce, because the Pearce presumption was subsequently narrowed by the Court in McCullough. Because Diggs was resentenced by a

different judge, the Magistrate Judge recommends that the state court finding that there is no presumption of vindictiveness, and its conclusion that this claim is without merit, are not contrary to nor an unreasonable application of Supreme Court precedent. In his counseled Objections, Diggs reasserts that the Pearce presumption applies. We overrule this objection on the basis of McCullough.

L. PCRA Court Error in Failing to Grant an Evidentiary Hearing on Affidavits Submitted by Witnesses Attacking the Credibility of Ricardo Kelsey

Diggs claims in his habeas petition that the PCRA court erred in failing to grant an evidentiary hearing regarding affidavits submitted from fellow inmates. Diggs asserts that, in these affidavits, fellow inmates affirm that Ricardo Kelsey, a Commonwealth witness, told them that he lied about Diggs's involvement in the murders in response to pressure placed on him by the police. The Magistrate Judge recommends finding that Diggs's claim of error on the part of the PCRA court is not cognizable in a federal habeas action. Diggs objects to this recommendation claiming this claim is cognizable in a federal habeas petition, relying on Lambert v. Blackwell, 387 F.3d 210 (3d Cir. 2004) for the proposition that the Third Circuit will review on the merits a claim in which a petitioner asserts error in PCRA proceedings.

We overrule Diggs's objection. Diggs's reliance on Lambert is misplaced. Lambert involved a question about whether the state's conduct during a PCRA hearing could be grounds to grant federal habeas relief. The Third Circuit did look at the merits of the petitioner's claim and denied relief because the claim was meritless. However, this was an alternative holding, stated after the Third Circuit noted that the "Commonwealth's conduct at the PCRA hearing is not a basis for habeas relief." Id. at 260. Similarly, in this case, Diggs's claim that the PCRA court erred in failing to conduct an evidentiary hearing is not a cognizable claim in a federal habeas petition. See Hassine v. Zimmerman, 160 F.3d 941, 954 (3d Cir. 1998) ("Thus, the federal role in reviewing an application for habeas corpus is limited to evaluating what occurred in the state or federal proceedings that actually led to the petitioner's conviction; what occurred in the petitioner's collateral proceeding does not enter into the habeas calculation.") (emphasis in original).

M. Prosecutorial Misconduct in Closing Argument

Diggs's last claim is that the prosecutor made several allegedly improper statements during closing

argument.[8] The statements by the prosecutor that Diggs contends were improper include:

1. Remarking that if the basement floor and walls could talk they would say Diggs was responsible for the victim's death.

2. Calling Diggs a liar and giving his personal opinion of Diggs's veracity.

3. Referring to the killing as a "slaughter" and an "annihilation."

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[8] The Magistrate Judge noted that consideration of this claim was complicated by the fact that Diggs captioned the claim as one of due process arising from prosecutorial misconduct, but argued both trial court error and ineffective assistance of counsel for failing to object to the prosecutor's statements. Because the state courts reviewed the claim solely in the context of ineffective assistance, the Magistrate Judge addressed the merits on that basis. We too limit our consideration to the claim actually presented to the state courts. The Magistrate Judge also noted that Diggs included statements in his habeas petition that he did not previously challenge in the state courts. He recommends that a claim based on any such statement is unexhausted and procedurally defaulted. We adopt that recommendation.

4. Referring to Diggs as a "vampire."

5. Asking the jury to find Diggs guilty so that the victim's soul could rest in peace.

6. Remarking that Diggs was a "beast," "inhuman," and "heartless," and equated the killing to "animal abuse" and "war crimes."

The Superior Court reviewed this claim in the context of a claim for ineffective assistance of counsel for failing to object to the prosecutor's comments, and in so doing found that the underlying claim had no merit. The Superior Court stated that "a new trial will only be required when the unavoidable effect of the prosecutor's comments would be to prejudice the jury, forming in their minds fixed bias and hostility toward the defendant so that jurors could not weigh the evidence and render a true verdict. Commonwealth v. Diggs, 3664 PHILA 1994, at 7 (Pa. Super. Aug. 15, 1996) (citing Commonwealth v. Faulkner, 595 A2d 28, 29 (Pa. 1991)). The Magistrate Judge recommends finding that the Superior Court's determination regarding ineffective assistance of counsel is not a contrary to or unreasonable application of the Strickland standard. We adopt the Magistrate Judge's recommendation.

The Superior Court's determination that the underlying claim of prosecutorial misconduct was

meritless is also not contrary to or an unreasonable application of Supreme Court precedent. To constitute a due process violation, the prosecutorial misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." Greer v. Miller, 483 U.S. 756, 756 (1987). The Third Circuit has explained that, under Supreme Court precedent, a "reviewing court must examine the prosecutor's offensive actions in context and in light of the entire trial, assessing the severity of the conduct, the effect of the curative instructions, and the quantum of evidence against the defendant." Here, the Superior Court reviewed each of the alleged instances of misconduct, and found that, after examining them in context, including the extraordinarily brutal nature of the killing, the comments did not create bias or hostility on the part of the jury such that it could not render a true verdict. While it might be argued that the comments of the prosecutor were inappropriate, it was not unreasonable for the state court to find that they did not render the entire trial fundamentally unfair.

IV. CONCLUSION

The *pro se* and counseled Objections filed by Petitioner Diggs are overruled and the Report and Recommendation submitted by Magistrate Judge Scuderi is approved. No issue raised by Diggs constitutes a substantial showing of the denial of a constitutional right. Accordingly, we dismiss the petition

for writ of habeas corpus and decline to issue a certificate of appealability. See 28 U.S.C. § 2253(c)(2).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CHARLES KIRK DIGGS	:	CIVIL ACTION
	:	
v.	:	
DAVID DIGUGLIELMO, et al.	:	NO. 06-24

ORDER

AND NOW, this day of November, 2007, upon consideration of the Amended Petition for Habeas Corpus Relief (Docket Entry # 13), the Report and Recommendation of Magistrate Judge Scuderi (Docket Entry # 18), Petitioner's Pro Se Objections to the Magistrate Judge's Report and Recommendation (Docket No. 19), Petitioner's Pro Se "Supplemental Objections Motion for a Evidentiary Hearing Petitioner's Motion for a Copy of the Record Relevant to the Issues Before this Court" (Docket No. 20), Petitioner's Counseled Objections to Magistrate's Report and Recommendation (Docket No. 23), Respondent's Response (Docket No. 24) and Petitioner's Pro Se Reply to the Response (Docket No. 27), IT IS HEREBY ORDERED that:

1. Petitioner's Pro Se Objections, Pro Se Supplemental Objections and Counseled Objections to the Report and Recommendation are OVERRULED.

2. The Report and Recommendation is APPROVED AND ADOPTED.

3. The Amended Petition for Habeas Corpus Relief is DISMISSED.

4. A certificate of appealability is DENIED pursuant to 28 U.S.C. 2253(c)(2).

5. The Clerk is directed to mark this matter closed.

BY THE COURT:

/s/ John R. Padova

John R. Padova, J.

APPENDIX F – OPINION, FILED OCTOBER 10, 2003

NON-PRECENDENTIAL DECISION- SEE SUPERIOR COURT I.O.P. 65.37

Commonwealth of PA,	:	In The Superior Court of
Appellee	:	Pennsylvania
v.	:	
Charles Diggs,	:	No. 570 EDA 2002
Appellant	:	

Appeal from the PCRA Order January 8, 2002
In the Court of Common Pleas of Philadelphia County
Criminal at No.: 74-07 2079

BEFORE: STEVENS, MUSMANNO, and OLSZEWSKI, JJ.

MEMORANDUM: FILED OCTOBER 10, 2003

Appellant, Charles Diggs, appeals from the January 8, 2002 order entered in the Court of Common Please of Philadelphia County, dismissing his petition brought under the Post Conviction Relief Act (PCRA), 42 Pa. C.S.A. §§ 9541-9546. Appellant's pe-

tition was dismissed without a hearing on the basis that the petition was without merit. On Appeal, Appellant raises fourteen issues for our consideration. We affirm.

On February 12, 1974, eighteen-year-old Linda DeBose was brutally stabbed to death in the basement of her home on Medary Avenue in Philadelphia. When Linda's mother, Alice DeBose, returned home from work at approximately 11:20 pm. on the evening of February 12, she found her daughter lying in a pool of blood. She immediately called the police who arrived shortly thereafter.[1] Linda DeBose was rushed to Albert Einstein Medical Center where she later died. Prior to her death, however, Linda was able to identify her attackers by name to both her mother and the police.

Within three hours of the murder, the Philadelphia police arrested Appellant's co-conspirator, Louis Riggins. Appellant was arrested two years later in Chester, Pennsylvania, where he had been hiding under several assumed names. Subsequent to his arrest, Appellant was released on bail but again fled and eluded authorities for an additional two years. He was arrested in Philadelphia on May 17, 1976.

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[1] Trial testimony revealed that Linda DeBose was stabbed approximately sixty-nine times in the throat, arms, and upper body, and was left to die.

Appellant was found guilty in 1977, after a trial by jury, of first degree murder, criminal conspiracy, possession of an instrument of crime, and prohibited weapons.[2] He was sentenced to life imprisonment. In 1991, Appellant was granted federal habeas corpus relief on the grounds that in his 1977 trial the prosecution had systematically excluded black venire persons by challenging them solely on the basis of race. A new trial was ordered pursuant to Batson v. Kentucky, 476 U.S. 79 (1986).[3] Appellant was retried in October of 1991, he was convicted of the above enumerated offenses, and he was again sentenced to life imprisonment for murder. Sentences for Appellant's other convictions were suspended.[4]

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[2] 18. Pa. C.S.A. §§ 2502 (a), 903, 907, 908, respectively. Two mistrials occurred in Appellant's case before he was convicted in 1977. Appellant's first trial ended at his insistence to allow him to bring new counsel into the case. The second trial ended in a mistrial when members of the jury were exposed mid-trial to newspaper coverage of Appellant's case.

[3] Although Appellant's conviction occurred in 1977, his direct appeal from the judgment of sentence of life imprisonment was still pending when the United States Supreme Court decided Batson.

[4] The record reveals that in a separate trial, Appellant's co-conspirator, Louis Riggins, was convicted of murder in the first degree and criminal conspiracy and sentenced to

On direct appeal, this Court affirmed the judgments of sentence on August 15, 1996, and the Pennsylvania Supreme Court denied allowance of appeal of July 14, 1997. Commonwealth v. Diggs, 685 A.2d 1041 (Pa. Super. 1996) (unpublished memorandum), appeal denied, 548 Pa. 666, 698 A. 2.d 592 (1997). The United States Supreme Court denied cetiorari on February 23, 1998. Diggs v. Pennsylvania, 522 U.S. 1123 (1998).

Appellant filed a timely pro se PCRA petition on January 27, 1999, and counsel was appointed. Multiple assignments and withdrawals of counsel followed until Appellant privately retained Eileen Eply Wiggins, Esquire, in June of 2000. Attorney Wiggins filed an amended PCRA petition on October 10, 2000, and a second amended PCRA petition on April 10, 2001. The commonwealth filed a motion to dismiss Appellant's CPRA petition on August 9, 2001.

On November 19, 2001, the PCRA court provided Appellant and his counsel with notice of impending dismissal of the PCRA petition pursuant to Pa.R.Crim. P. 907. By order dated January 8, 2002, the PCRA court dismissed Appellant's PCRA petition without a hearing due to lack of merit.

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life imprisonment. A third co-conspirator, Alfred Clark, was acquitted of all charges in a separate trial.

Appellant filed a pro se notice of appeal of February 1, 2002. On February 6, 2002, pursuant to Pa.R.A.P. 1925(b), the PCRA court ordered Appellant to file a Concise Statement of Matters Complained of on Appeal within thirty (30) days. On February 28, 2002, Appellant filed with the clerk of courts and the PCRA court judge a pro se document he entitled, "Addendum—Issues for 1925 (b) Statement," wherein he raised one issue regarding the PCRA court's failure to grant hearing regarding the affidavits of Charles Giles and Timothy VanHook.[5] The PCRA court addressed this issue in its opinion filed on March 25, 2002.[6]

Appellant raises fourteen issues on appeal. With regard to issues one through thirteen, we conclude that they are waived because Appellant failed to file properly with the clerk of courts a

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[5] With the exception of the "addendum," the certified record does not contain any Pa.R.A.P. 1925(b) statement.

[6] We note that on March 6, 2002 Ramy I. Djerassi, Esquire was appointed to represent Appellant on appeal. On August 29, 2002, this Court dismissed Appellant's appeal because he failed to file a brief; however, following a hearing pursuant to Commonwealth v. Grazier, 552 Pa. 9, 713 A.2d 81 (1998), Appellant was subsequently permitted to proceed pro se and he filed a brief, which is presently before us.

Pa.R.A.P.1925(b) statement addressing these issues.[7]

As stated above, the PCRA court ordered Appellant Pa.R.A.P. 1925(b) statement. In Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306, (1998), the Pennsylvania Supreme Court established a clear rule for waiver under Pa.R.A.P. 1925 by stating that any issues not raised in a court-ordered Pa.R.A.P. 1925 (b) statement will be considered waived on appeal. Futhermore, in Commonwealth v. Butler, 571 Pa. 441, 812 A.2d 631 (2002), the Pennsylvania Supreme Court specifically extended its holding in Lord to PCRA appeals and held that:

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[7] On March 25, 2002, the PCRA court filed an opinion wherein it addressed thirteen issues. It is unclear from the PCRA court's opinion whether the opinion was written in response to an initial Pa.R.A.P. 1925(b) statement, which may have been provided to the PCRA court judge but not filed with the clerk of courts, or whether the opinion was filed in response to Appellant's PCRA petitions. In either event, as if discussed infra, we conclude the Appellant's issue one through thirteen are waived under Commonwealth v. Lord, 553 Pa. 415, 719 A.2d 306 (1998), and its progeny, since no copy of a Pa. R.A.P. 1925(b) statement addressing these issues was filed with the clerk of courts. Without a copy of Appellant's Pa.R.A.P. 1925(b) statement, we are unable to determine whether Appellant properly raised issues one through thirteen therein.

> In Lord, [the Supreme] Court eliminated any aspect of discretion and established a bright-line rule for waiver under Rule 1925.'[I]n order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived.' Thus, waiver under Rule 1925 is automatic.

Butler, 571 Pa. at 444, 812 A.2d at 633 (quotation omitted) (emphasis in original). In Butler, the Supreme Court also discussed the dual filing requirement of Pa.R.A.P. 1925(b). Specifically, the Supreme Court stated: "Rule 1925 is not satisfied when an appellant merely mails his rule 1925(b) statement to the presiding judge. Rather, Rule 1925(b) requires appellants to 'file of record in the lower court and serve on the trial judge a concise statement of the matters complained of on appeal...'" Butler, 571 Pa. at 446, 812 A.2d at 634 (quotation omitted). Thus, under the rationale of Butler, where an appellant fails to serve a court-ordered Pa.R.A.P. 1925 (b) statement upon the lower court judge and file the same with the clerk of courts, the issues are waived as if the appellant failed to file a Pa.R.A.P. 1925(b) statement at all.

In the case sub judice, with the exception of his "addendum," Appellant failed to file a 1925(b) state-

ment with the clerk of courts, which explains why the certified record is devoid of any such documents. As this Court stated in Bryant v. Glazier Supermarkets, Inc., 823 A. 2d 154, 156 (Pa.Super.2003):

> [I]t is the obligation of the appellant to make sure that the record forwarded to an appellate court contains those documents necessary to allow a complete and judicious assessment of the issues raised on appeal. Under our Rules of Appellate Procedure, those documents which are not part of the 'official record' forwarded to this Court are considered to be non-existent. These deficiencies may not be remedied by inclusion in a brief in the form of a reproduced record. Similarly, these deficiencies cannot be cured by indicating that the relevant document was simply mailed to the office of the trial judge but not filed of record.

(citations, quotations, and quotation mark omitted). As such, we find Appellant's issues one through thirteen waived because he failed to file his court-ordered Pa.R.A.P. 1925 (b) statement with the clerk of courts.

With regard to Appellant's fourteenth claim, that the PCRA court should have held a hearing regarding affidavits submitted by Giles and VanHook, as stated above, the certified record indicates Appellant included this issue in his 1925(b) addendum, which

was filed with the clerk of courts, and the PCRA court judge addressed this issue in his March 25, 2002 opinion.[8] As such, we decline to find waiver under Lord and its progeny. However, we conclude that Appellant's issue is meritless.

Appellant contends that the PCRA court should have held an evidentiary hearing to consider newly discovered evidence, namely two affidavits which were submitted by fellow inmates, Giles and VanHook.[9] Appellant contends that both inmates indicated in their affidavits that Ricardo Kelsey told them that he lied at trial about Appellant's involvement in the murder. We agree with the PCRA court that Giles and VanHook did not specifically assert in their affidavits that Kelsey told them that he lied at trial, see PCRA Court Opinion filed 3/25/02 at 20-21, and we note that noticeably absent is an affidavit from Kelsey indicating that he lied at trial.[10] As

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[8] The PCRA court judge did not acknowledge receipt of Appellant's supplemental Pa.R.A.P. 1925(b) statement in its opinion. However, since the PCRA court judge filed its opinion after Appellant filed the supplemental statement, wherein he raised his fourteenth allegation, we decline to find waiver on the basis of Lord and its progeny.

[9] Appellant has attached to this reproduced record affidavits from Giles and VanHook.

[10] As the PCRA court indicated in its opinion, the trial court granted a protective order with regard to Kelsey

such, we conclude that the PCRA court did not err in failing to hold an evidentiary hearing concerning the inmates' affidavits.

Affirmed.

Judgment Entered.

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Prothonotary

Date: Oct 10 2003

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because Appellant threatened to kill Kelsey if he testified at Appellant's trial. PCRA Court Opinion filed 3/25/02 at 21.

APPENDIX G – ORDER, DATED MARCH 20, 2008

CHARLES KIRK DIGGS

vs. No. 07-4582

DAVID DIGUGLIELMO

(E.D. PA. Civ. No. 06-cv-00024)

Present: AMBRO, FUENTES and JORDAN, Circuit Judges

Submitted are:

(1) Appellant's motion for leave to file application for certificate of appealability in excess of 20 pages; and

(2) Appellant's request for a certificate of appealability under 28 U.S.C. § 2253(c)(1);

in the above-captioned case.

Respectfully,

Clerk

MMW/DNH/zm/isc

ORDER

The foregoing motion for leave to file a request for a certificate of appealability in excess of 20 pages is granted and the Clerk's office is directed to file Appellant's request for a certificate of appealability.

The foregoing request for a certificate of appealability is denied, as jurists of reason could not debate that the District Court properly denied his petition for a writ of habeas corpus, for substantially the reasons set forth in its opinion. *See Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000).

By the Court,

/s/ Julio M. Fuentes
Circuit Judge

Dated: March 25, 2008
LML/cc: Mr. Charles Kirk Diggs
Joshua S. Goldwert, Esq.

APPENDIX H – SUR PETITION FOR REHEARING EN BANC, DATED APRIL 29, 2008

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUI

No. 07-4582

CHARLES KIRK DIGGS,

Appellant

v.

DAVID DIGUGLIELMO, WARDEN; THE DISTRICT ATTORNEY OF THE COUNTY OF PHILADELPHIA; THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA

SUR PETITION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, BARRY, AMBRO, FUENTES, SMITH FISHER, CHAGARES, JORDAN and HARDIMAN, Circuit Judges

The Petition for Rehearing filed by the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judge of the circuit in regular services not having voted for rehearing, the Petition for Rehearing by the panel and the Court en banc, is hereby DENIED.

BY THE COURT,

/s/ Julio M. Fuentes
Circuit Judge

DATED: April 29, 2008
ISC/cc: Charles Kirk Diggs
Joshua S. Goldwert, Esq.